SUPREME COURT, U. S.

APR 30 1974

Supreme Court of the United States.

OCTOBER TERM, 1973,

No. 73-1631

LOUIS OSTREER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

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Supreme Court of the United States.

OCTOBER TERM, 1973.

No.

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

Louis Ostrer petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and denying his motion for a new trial.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York denying the motion for new trial is as yet unreported and is found in Appendix 1, *infra*. The opinion of the Court of Appeals, also not yet reported, is found in Appendix 2, *infra*.

Jurisdiction.

On January 26, 1973, defendant-petitioner, Louis Ostrer, was convicted in the District Court for the Southern District of New York after a three-week jury trial on 17 counts involving a complicated stock manipulation scheme. Prior to sentencing, petitioner moved for a new trial on the ground that one of his jurors was incompetent, or, in the alternative, for an evidentiary hearing, which motion was denied by the District Court on April 12, 1973, on which date judgment of conviction was entered, and petitioner was sentenced to 3 years imprisonment and a $55,000 fine. On appeal, his conviction and the denial of the motion for new trial were affirmed in a judgment of the United States Court of Appeals for the Second Circuit entered March 1, 1974. Upon timely application for an extension of time in which to file a petition for writ of certiorari, Mr. Justice Marshall extended the said filing time to and including April 30, 1974. This Court has jurisdiction to review the judgment below under the provisions of 28 U.S.C. § 1254.

Questions Presented.

1. Whether a post-verdict, unsolicited letter from a juror who says, *inter alia*, that she can "see things before it happen" and that various things "appear before me when I was on the jury bench" requires further inquiry into whether the juror is "incapable, by reason of mental . . . infirmity, to render satisfactory jury service" (28 U.S.C. § 1865), where seven psychiatrists have all agreed, without contradiction, that the letter evidences hallucinations, delusions and probable psychosis, and where the government has proposed a hearing procedure that it acknowledges would "provide maximum safeguards for the jurors' individual rights of privacy."

2. Whether the dramatic shift away from formal adjudications of insanity in treatment of the mentally ill in the last two decades, which has virtually eliminated use of such adjudications, requires reversal of the decisions below which relied on pre-1952 precedents in holding that hearings are not required without a prior showing that the juror had ever been formally adjudicated insane.

3. Whether the decision below denying a hearing in a case where the juror's own unsolicited letter revealed that matters not in evidence "appear before [her] on the jury bench" and where uncontradicted psychiatric studies of the letter indicate a likelihood that during the trial the juror was probably suffering from delusions and hallucinations, and where there is evidence on the record that the juror was lucid-appearing on the surface and hence could introduce delusional "facts" into the jury room, is inconsistent with the traditional case law regulating the introduction of extra-judicial information into the deliberations of the jury.

4. Whether this case be remanded for a hearing where the lower courts based their refusal to hold a hearing into the juror's competence in part upon that juror's indications on pre-trial *voir dire* that she held a responsible position as a "patient attendant" in a metropolitan hospital, where it now appears that the juror may, in fact, have been a *patient* at the hospital who worked part time as a patient-attendant, rather than an outside employee.

5. Whether it violated the defendant's Fifth Amendment privilege against self-incrimination for the prosecutor to comment in his summation to the jury that "it is a terribly significant factor" that the testimony of the government's chief witness as to the defendant's guilty *scienter* remains uncontradicted because the defense put no witness on the stand with respect to that point, where that testimony in-

volved a meeting between the government witness and the defendant concerning which the defendant himself was the only available witness.

Constitutional Provisions Involved.

UNITED STATES CONSTITUTION.

AMENDMENT 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions Involved.

28 U.S.C. § 1865 (JURY SELECTION AND SERVICE ACT OF 1968, P.L. 90-274, 82 STAT. 53):

. . . . . .

(b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries unless he . . .

. . . . . .

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

Statement of The Case: the Juror Issue. *

The facts giving rise to the juror issue in this case are undisputed. Thirteen days after the jury returned a verdict of guilty, one of the defendants received an unsolicited and bizarre letter from one of the jurors. In her letter, the juror, a Miss Genena Rush, claimed to "have eyes and ears that I can see things before it happen." She said that she could "tell you about other and what they are thinking and doing." She indicated a desire to "visit" the defendant "when my eyes fully open," but she did not "know at the present when they will open," since "a curse was put upon them some years ago." She wanted to talk to the defendant "about what appear before me. . . ." She could "not omit what appear before me, when I was on the jury bench." She assured the defendant that he did not have to worry about having been convicted:

> "You feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, how-

* The facts relating to the prosecutor's comment are incorporated into part III of this petition, *infra* at p. 28.

> ever, I am wrong it is the first time. . . . I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free."[1]

The letter included various references to the defendant's wife, whom the juror apparently claimed to "see" (although it is uncontested that the defendant's wife never once appeared at the trial):

> "Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch."[2]

The letter also included some sexual and racial allusions: "I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me. Let's leave color out, OK."

The entire letter is reproduced in Judge Feinberg's dissent. Appendix 2, at pp. 50-52.

When this letter was brought to the attention of the trial court, his response was to order that the juror not be contacted by anybody or communicated with by anybody in any possible way, directly or indirectly. "[B]oth defense and government counsel apparently interpreted the order as inhibiting any investigation of the juror, even apart from talking to her." Judge Feinberg's dissent, at

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[1] It is not clear who—if anyone—"told" this to Miss Rush, or whether Miss Rush conveyed this item—or other items—of misinformation to the other jurors.

[2] There is no basis in fact for these conclusions concerning the defendant's wife.

A. p. 54. Forbidden from undertaking further investigation of the juror, defense counsel did the next best thing: they retained the professional services of seven expert psychiatrists to analyze the letter. As the Court of Appeals acknowledged, "all" of these psychiatrists—who were Board certified and whose credentials were not disputed—"responded . . . to the effect that, in their opinion, what Miss Rush had written indicated hallucinatory tendencies, symptoms of possible psychosis, paranoia, and grandiosity, and in general an inability to appreciate reality without fantasizing." Appendix 2, at p. 35. The conclusions of several of these experts are excerpted below.

Dr. Stanley Portnow, former chief forensic psychiatrist at Bellevue Hospital, submitted an affidavit which included the following:

> "The letter is typical of those written by paranoid psychotic individuals suffering from a schizophrenic thought disorder found in great abundance in mental hospitals throughout the country. [It] is replete with psychopathology so blatant that one need not make a careful dissection of it in order to conclude that the juror was possessed of a substantially impaired ability to exercise judgment in the evaluation of evidence and in following the requirements of law as given to her by the instructions of a Judge.
>
> . . . . . .
>
> "Perhaps the most significant statement in the letter concerning the juror's state of mind during the course of the trial is as follows: 'As I stated I cannot admit what appear before me, when I was on the jury bench.' We have here an admission that the juror visually hallucinated during the course of the trial."
>
> "People who suffer from visual hallucinations are psychotic, that is, they are detached from reality and

are unable to exercise critical judgment normally attributable to the average person. The juror goes on to reveal that her visions compel her to act in certain ways: 'Something appear before me that I must do.'

. . . . . .

"It is my professional opinion, based upon a careful analysis of the letter, that the letter makes a positive presumptive showing that, *at the time of the trial, the juror suffered from a chronic psychotic thought disorder which so severed her relationship with reality that she was unable to exercise critical judgment or to function in an unbiased manner in the evaluation of evidence produced at the trial.* Indeed, it would appear that her unsoundness of mind was so overwhelming that she was subject to auditory and visual hallucinations, delusions and a belief in her own omnipotence.

. . . . . .

"[T]he juror is, based on the evidence produced in this letter, suffering from a psychotic disorder and is a woman of unsound mind.

. . . . . .

"It is my professional opinion that the letter in question is positive presumptive evidence that the juror was psychotic at the time she wrote it and for some time prior thereto, including the period of the trial." (Emphasis added)

Dr. Robert Damino, the Medical Director of the Family Court Mental Health Clinic of Nassau County, concluded that:

> "The contents of the letter . . . clearly indicate that she was having visual hallucinations. . . . [A]t the time that she served on the jury she was utterly incapable of thinking logically as to the evidence, and utterly incapable of properly evaluating the evidence."

Dr. Jerry Atkins, associate attending psychiatrist at St. Vincent's Hospital, concluded that there is evidence in the letter of "auditory and visual hallucinations" and that Miss Rush "would have had great difficulty exercising sound judgment during the trial mentioned in her letter."

Dr. John Vetter concluded that:

> "Examination of the content of this letter reveals clear cut evidence of mental disorder in the writer in the form of repeated references to hallucinatory experiences, with one specific reference to such an experience while serving as a juror at the trial. There is also clear cut evidence of delusional thinking with ideas of persecution and of being observed.
>
> . . . . . .
>
> "The abnormal thinking processes, impairment of judgment, hallucinatory experience and delusional belief directly involving the case at hand, would indicate an incapacity, by reason of mental infirmity, to render efficient jury service, or to have functioned efficiently as a juror in the case concerned."

Dr. Donald Brough concluded that:

> "In my opinion it is most likely that she is, in fact, suffering from a Paranoid Condition in which she has hallucinatory experiences and delusional thinking."

Dr. Samuel Karlan concluded that:

> "It is clear from this letter that this patient is having imaginations about what she can see and what she can do and these are in the form of visual hallucinations and apparently auditory hallucinations. It is also clear from this letter that she had these visions while she was on the jury."
>
> "It is therefore my opinion that the letter is evidence that this patient underwent a psychotic episode while she was on the jury and while she wrote this letter, which is suggestive of a schizophrenic mechanism and that she was not in contact with reality."

The District Court, without in any way disputing the uncontradicted expert evidence of these psychiatrists, concluded that the defendant had not made a showing sufficient to warrant a hearing of any kind. It held that no hearing is required unless a juror had been formally "adjudged mentally incompetent" in a "separate and unrelated proceeding." The District Court denied a hearing despite the Government's expressed acknowledgment that a hearing—if conducted according to a procedure suggested by the Government—"would provide maximum safeguards for the juror's individual rights of privacy." See fn. 25, *infra*. The majority of the Court of Appeals, in a two-to-one decision, affirmed the district court's decision, agreeing that a hearing would be required "only" when "there be proof of an adjudication of insanity or mental incompetence. . . ."[3]

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[3] It is, of course, possible—indeed very likely—that Miss Rush may, in fact, have been adjudicated insane or mentally incompetent in the recent past. In light of the district court's prohibition on investigating the juror, it cannot be assumed—for purposes of deciding this case—that Miss Rush had not been certified. Nor can it be assumed—as both lower courts did—that she is currently employed at a hospital. Indeed, her own statement on voir

Judge Feinberg "emphatically" dissented from the Court of Appeals affirmance of the District Court's decision. Characterizing the letter as "bizzare" and "staggering in its implications," he observed that "[n]o special training is needed to appreciate that this juror seems to believe she is clairvoyant and can see things that may not, or could not, be apparent to others." Indeed, Judge Feinberg points to at least one thing that Miss Rush "saw" which others could not see: "Although Dioguardi's wife was never in the courtroom, the juror somehow knows that Mrs. Dioguardi 'is a brave girl' and 'is still in business,' but is being watched." Moreover Judge Feinberg pointed out that this is a case where there was expert evidence by seven psychiatrists with extensive special training—evidence "uncontradicted on the record before us"—that confirmed what the letter itself strongly suggests: that Miss Rush was suffering from "a seriously disabling thought disorder which in their opinion would have impaired mental functioning during the trial and her ability to judge the case intelligently."

Judge Feinberg argued that "if juror Rush actually did believe she was clairvoyant in this way"—a conclusion that this Court must accept on the record of this case—then it is clear that "she could not fairly try the guilt or innocence of any man":

> . . . It seems obvious to me that a "clairvoyant" juror might honestly "see" a defendant's guilt despite the lack of evidence because she can see into the defendant's mind. Or conversely, she might for the same reason divine a defendant's innocence, in the face of

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dire that she is "a patient attendant" at a hospital with a large psychiatric department is entirely consistent with the conclusion that she may currently be a mental patient working part time as a patient-attendant. See *infra* at pp. 25-26.

overwhelming proof of guilt. A person who was known to regard herself as clairvoyant would certainly not be allowed on a jury in the first place. *United States* v. *Silverman*, 449 F. 2d 1341, 1344 (2d Cir. 1971), cert. denied, 405 U.S. U.S. 918 (1972); *United States* v. *Benson*, 31 Fed. 896, 900 (D. Cal. 1887). Such a woman would clearly be "incapable, by reason of mental . . . infirmity, to render satisfactory jury service . . ." under 28 U.S.C. 1865(b)(4). Cf. *Jorgensen* v. *York Ice Machinery Corp.*, 160 F. 2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947). Moreover, the incapacity on such a ground of even one juror would poison the verdict regardless of the competency of the remaining 11. *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966) (per curiam); *United States* v. *Rattenni*, 480 F. 2d 195, 198 (2d Cir. 1973).

Judge Feinberg concluded that the "combined effect of the uncontradicted record [of the seven psychiatrists' conclusions that the juror was psychotic] and the apparently intended scope of the judge's order [not to conduct any investigation of the juror] requires a remand for a further hearing." He disputed the majority's contention that a remand would open "a Pandora's box" of challenges to jury verdicts, pointing to the wholly unsolicited nature of this bizzare letter and the possibility of further investigation short of compelled examination of the juror.[4]

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[4] "The letter which forms the basis of the present attack on the verdict below was, as I have stressed, unasked for, and not the product of a fishing expedition. Moreover, an inquiry into competence need not entail a probe of jury discussions. I have already mentioned such alternative possibilities of enlarging the record as cross-examination of appellant's witnesses and testimony by government experts. Counsel may also develop evidence by investigating the juror's background or by persuading her to undergo a voluntary mental examination." Appendix 2 at p. 56.

Circuit Judge Mansfield joined Judge Feinberg in dissenting from the Court of Appeals denial of rehearing *en banc*.

Reasons for Granting the Writ.

I. The Decision Below, Denying a Hearing on the Ground that No Evidence was Presented that Juror Rush had Ever been Formally Adjudicated Insane, Failed to Take into Account the Major Changes that have Occurred in the Treatment of the Mentally Ill over the Past Two Decades—Changes that have Virtually Eliminated the Use of such Formal Adjudications.

The decisions of the lower courts in this case were based on the anachronistic assumption that only persons who have been formally adjudicated as insane are disqualified from jury service under the "mental . . . infirmity" provision of 28 U.S.C. § 1865 (b)(4). This assumption reflects an outdated view of the diminishing role of formal adjudications of insanity in the treatment of the mentally ill. Over the past decade, formal adjudications of insanity have virtually disappeared and have been replaced by informal and voluntary treatment for the mentally ill. The mentally ill persons who are now treated informally and voluntarily are no more competent to serve on juries than were the mentally ill who have been adjudicated insane in past decades. Accordingly, formal adjudication of insanity can no longer be regarded as the benchmark of disqualification from jury service.

A. *The Lower Court Opinions.*

The Court of Appeals, in affirming the District Court's denial of petitioner's motion without a hearing, summarized the law on which it was relying in the following terms:

> ". . . courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial."

The District Court likewise concluded that a hearing would be required *only* in situations where there had been a formal "adjudication of incompetency, without a restoration to competency. . . ." Absent an "adjudication of incompetency," the judge said, the courts are justified in refusing to hold an evidentiary hearing. The decisions of both lower courts, therefore, were explictly premised on the assumption that the mental infirmity disqualification of 28 U.S.C. § 1865 applied only to mentally ill persons who have been formally adjudicated as "insane" or "incompetent" and that a convicted defendant may not obtain a new trial if he discovers shortly after the verdict that one (or presumably several) of his jurors were mentally ill, so long as they were never formally adjudicated as insane.

In support of this view of the law, the Court of Appeals cited 13 cases for the proposition that evidentiary hearings are properly denied on a claim of juror incompetency when there is no showing that there had been a formal adjudication of insanity; every single one of those decisions was rendered before the year 1952[5]—the approximate begin-

[5] The Court of Appeals did cite one 1964 case, *Eastman Kodak Stores Inc.* v. *Summers*, 377 S.W. 476 (Kansas C.C.A.). But it miscited the case: in *Eastman* the challenged juror had been "adjudicated to be a person of unsound mind" some 40 years prior to his service on the jury. On the basis of this fact alone, "the

ning of the trend away from formal adjudications of insanity. In light of the dramatic developments, to be summarized below, these cases—and the doctrine for which they were relied on by the lower courts—can no longer be regarded as good law.

B. *The Trend Away from Formal Adjudication of Insanity.*

In 1949, nearly 90 per cent of all admissions to mental hospitals were by means of certifications of insanity (or other comparable "involuntary" proceedings); only about 10 per cent of mental hospital admissions were informal or voluntary.[6] By 1972—the last year for which there are reliable statistics—these figures had shifted dramatically: only 44 per cent of all admissions were by formal certification; 54 per cent were voluntary or non-protesting admissions.[7] In certain urban centers—such as New York,

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Court, on its own motion, held a hearing. . . ." At that hearing the testimony established that the juror "operated a farm, bought and sold livestock, transacted other farm business, and appeared to be normal. Dr. V. P. Dryer, the juror's physician for many years, said he had treated Crutchfield for epilepsy but believed he was of sound mind." It was on the basis of that testimony—elicited at a hearing—that a new trial was denied. *Id.* at 481.

[6] World Health Organization, *Hospitalization of Mental Patients* (1955), cited in American Bar Foundation, *The Mentally Disabled and the Law*, 17, n. 8 (rev. ed. S. Brakel and R. Rock, eds. 1971).

[7] During 1972, state and county mental hospitals admitted 403,924 patients: 41.8 per cent (169,032) were involuntarily committed, 1.5 per cent (6,190) were transferees from prisons, 2.3 per cent were admitted after a finding of incompetency to stand trial, and 54.4 per cent were admitted on a voluntary (196,346) or non-protesting (23,095) basis. Letter from National Institute of Mental Health to Harvard Law Review, April 5, 1974 (Enclosure A), cited in *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1193, n. 3 (1974) (in press).

where this case occurred—the shift has been even more dramatic.[8] In San Francisco, for example, during the five-year period between 1964 and 1969, the number of formal insanity commitments dropped by about 96 per cent (from 2,882 to 108).[9] This dramatic shift—characterized in the American Journal of Psychiatry as the "virtual disappearance of commitment except for a handful of patients"[10]—resulted from a decision to reorganize the mental services of that city from a hospital-based system to a community center-based system. This process is being carried on throughout the United States, with equally dramatic reductions in formal commitments and adjudications.[11]

Adjudications of incompetency are also in the process of disappearing. During the 1972-1973 judicial year only 113 incompetency proceedings were initiated in all of New York

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[8] See generally McGee and Wolf, *Patterns of Community Mental Health Development in Major American Cities*, 8 Community Mental Health J. 17 (1972); Kolb, Bernard, and Dobrenweind, eds., *Urban Challenges to Psychiatry: The Case History of a Response* (1969); Dahl and Leopold, eds., *Mental Health and Urban Social Policy* (1968); Ryan, ed., *Distress in the City: Essays on the Design and Administration of Urban Mental Health Services* (1969).

[9] Stubblebine and Decker, *Are Urban Mental Health Centers Worth It?* 127 Am. J. Phychiatry 908,910 (1971).

[10] *Id.*

[11] See *e.g.*, Joost and McGarry, *Massachusetts Mental Health Code: Promise and Performance*, 60 A.B.A.J. 95 (1974), reporting that the percentage of voluntary admissions to state hospitals rose from 27 per cent in 1971 to 77 per cent in 1972, following a comprehensive revision of that state's mental health laws; see Mass. Gen. Laws Ch. 123, § 1 et seq. See also Cal. Welf. and Institutions Code, 5000 et seq. (The Lanterman-Petris-Short Act, effective July 1, 1969) and the New York Mental Hygiene Law § 1.01 et seq. (McKinney Supp.) (enacted 1972 and effective January 1, 1973) as recent examples of complete recodification and reform of statutes regarding mental illness.

State; in New York County—where this trial occurred—there was but *one single* incompetency case brought during that year.[12] All the authorities agree that there has been a marked trend away from formal adjudications of insanity, from involuntary commitment to mental hospitals, and from adjudications of incompetency.[13]

The reason for this shift has not been a reduction in the incidence of serious mental illness; indeed, there is no indication that the number of seriously mentally ill persons has significantly decreased over the past two decades.[14] The mental patients who are now being treated voluntarily in community-based programs without certification or commitment are—on the whole—no less seriously mentally ill than were those patients who used to be formally certified and involuntarily committed.[15] It is undisputed that hundreds of thousands of extremely mentally ill patients are now being treated on an informal and non-certified basis. These seriously ill patients—many of whom are grossly psychotic and actively hallucinatory—are no more com-

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[12] Bronx and Richmond Counties reported no incompetency cases, Kings County reported 15, and Queens County 17. Report of the Administrative Board of the Judicial Conference of the State of New York, App. F., Table 8 (1974).

[13] See generally, American Bar Foundation, *The Mentally Disabled and the Law*, 1-65 (rev. ed. 1971); Fairweather, Sanders, Maynard, Chessler, and Block, *Community Life for the Mentally Ill: An Alternative to Institutional Care* (1969).

[14] The demand for services has, in fact, increased. See, *e.g.*, Ozarin and Feldman, "Implications for Health Service Delivery: The Community Mental Health Centers Amendments of 1970." 61 Am. J. Public Health 1780 (1971).

[15] See *e.g.*, Marx, Test and Stein, "Extrahospital Management of Severe Mental Illness," 29 Arch. Gen. Psychiat. 505 (1973); Weinman, Sanders, Kleiner, and Wilson, "Community Based Treatment of the Chronic Psychotic," 6 Commun. Ment. Health J. 13 (1970).

petent to serve on juries than were the certified inmates of mental hospitals several decades ago. The reason that this generation of psychotic mentally ill patients have not been certified or committed bears no relation to their competency to serve as jurors.[16] Improvements in the legal status of the mentally ill should not inure to the disadvantage of criminal defendants. Those legislatures that have voted to eliminate—or reduce the frequency of—adjudications of insanity never contemplated that formerly certified mentally ill persons would now become eligible for jury service. Yet, under the principles of law relied on by the lower courts in this case, the presence of an actively hallucinatory psychotic—or even several—on a jury does not deny a defendant his constitutional and statutory rights unless that psychotic is among the rare group that has been adjudicated or certified as insane, or unless his insanity has called itself to the attention of counsel or the trial judge during the *voir dire.*[17]

There is simply no basis in fact—or in law—for making a determination of jury disqualification turn on formal

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[16] The handful of mentally ill persons who are currently "certified" or "adjudicated" insane or incompetent are probably not more seriously mentally ill than those who are not currently certified. They are more likely to be wealthy (and thus the object of guardianship proceedings), involved in crime (and thus found incompetent to stand trial, or not guilty by reason of insanity) or live in areas where certification is more routinely employed than in other areas.

[17] It is significant that this case grows out of the Southern District of New York, where extremely limited voir dires are conducted by the judge and not by counsel. This is unlike the practice in many jurisdictions where defense counsel may question prospective jurors directly. The Second Circuit practice makes it far more difficult to ferret out the existence of mental illness among potential jurors. See, Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 Brooklyn L.J. 290 (1972).

adjudications of insanity. The time has now come for this Court authoritatively to reject the approach relied on by the lower courts, and to substitute criteria for jury disqualification that are more realistically related to the appropriate qualifications for serving on a federal jury.

This case provides this Court with a suitable context in which to perform this function: it need not decide any factual issues; it need only remand the case to the lower courts for a hearing and for a reconsideration of the appropriate standards in light of the development in mental health law and practices over the past several decades.[18] Nor would such a remand open up a "Pandora's Box," as the District Court feared. The wholly unsolicited nature of the letter at issue here dramatically distinguishes this case from the run of cases where disappointed litigants might seek to engage in fishing expeditions concerning the competency of jurors. See Judge Feinberg's dissent, Appendix 2 at p. 56.

II. The Decision Below, Denying a Hearing in a Case where the Juror's Own Letter Revealed that Matters Not in Evidence "appear before [her] on the jury bench," is Inconsistent with the Traditional Case Law Regulating the Introduction of Extra-Judicial Information into the Deliberations of the Jury.

A cardinal principle underlying our system of trial by jury is that:

> "while the jury may leaven its deliberations with its wisdom and experience, in doing so it must not bring extra *facts* into the jury room. . . . To the greatest extent possible all factual [material] must pass through the judicial sieve, where the fundamental guarantees

[18] The limited scope of such an evidentiary hearing is discussed at pp. 23-24, *infra*.

of procedural law protect the rights of those accused of crime." *United States* v. *McKinney*, 429 F. 2d 1019, 1023 (5th Cir. 1970).

It is undisputed on the record of this case, that juror Rush believed she saw, heard, or knew various matters "while [she] was on the jury bench" that were not in evidence—and were indeed not true. She saw that the defendant was "persecut[ing] your wife" and "tak[ing] it out on her"; that his wife "is still in business"; that she is trying "hard"; but that "she is being watch." (The wife never appeared in the courtroom.) Juror Rush also saw what other people "are thinking and doing." She was told—by whom or what we do not know—that "you will only have to serve one-third of the time given" and that "soon you will be free." Perhaps most ominously, "something appear before me that I must do." What that something was we do not know; but it is not unreasonable to assume that whatever it was, it told her that she must vote to convict the defendant so that he may "repent." ("Repent" was another word that "appear before me.")

There is also undisputed psychiatric evidence in this case—which, absent a hearing or government affidavits, must be taken as true—that what the juror saw and heard were "hallucinations" and "delusions," and it is universally accepted in the psychiatric literature that "by definition delusions are false ideas that cannot be corrected by reasoning. . . ,"[19] and that "hallucinations may absorb much or all of the patient's attention and may motivate his behavior to a considerable extent."[20]

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[19] Freedman and Kaplan, *Comprehensive Textbook of Psychiatry* (1967), chapter by Lehmann, "Schizophrenia: Clinical Features," at 623.

[20] Freedman and Kaplan, *Comprehensive Textbook of Psychiatry* (1967), chapter by Lehmann, "Schizophrenia: Clinical Features, at 623. See also Detri and Jarecki, *Modern Psychiatric Treatment*

A juror who brings into the jury room not only a mind incapable of reasoning on the basis of the evidence presented "through the judicial sieve," *United States* v. *McKinney, supra,* but a mind which purports to have knowledge learned from sources other than those appearing at the trial, poses the danger not only of depriving the defendant of one in twelve competent jurors,[21] but the further danger that other jurors might be infected by the delusional juror's presentation in the jury room of "facts," either about the case or about the defendant, which are false or inadmissible.[22]

Courts have generally required hearings in cases where extra-judicial facts are shown to have crept into the jury room, and where such material may have been communi-

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(1971), at 414 ("[the patient] may . . . exhibit illusive pseudo-recognition, misidentifying relative strangers . . . as persons he has known in the past.") and at 117 ("hallucinations may occur even while [the patient] appears fully awake and increase to the point where they dominate his entire subjective experience and govern all his waking behavior."); Freedman and Kaplan, *id.*, chapter by Lin, "Clinical Manifestations of Psychiatric Disorders," at 565 ("A hallucination is . . . an internal psychological event . . . mistakenly attributed to an external source.").

[21] Of course, even if eleven out of twelve jurors are competent, a defendant has been deprived of his Sixth Amendment rights to a fair jury trial. This would even be true in a jurisdiction which allows convictions by a less than unanimous vote. *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966).

[22] Courts have been extremely careful to preserve the integrity of the "judicial sieve." See *Parker* v. *Gladden*, 385 U.S. 363 (1966) (court bailiff made remarks to two jurors which were derogatory to the accused; held, such communications violated the commands of the Sixth Amendment relating to trial by an impartial jury and the right of confrontation); *Remmer* v. *United States*, 347 U.S. 227, 229 (1954) (during trial a person unnamed had communicated with a juror a remark that he could profit by bringing in a verdict favorable to the defendant; held, "[i]n a criminal case, any private communication . . . with a juror . . .

cated to one or more jurors, and where such communication could not be assumed to be harmless to the defendant.[23]

In order to determine whether or not juror Rush did indeed make any such delusional "factual" communications to the jurors, one would not have to delve into the thought

about the matter pending before the jury is . . . deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial. . . ."); *Bates* v. *Preble*, 151 U.S. 149 (1894) (reversible error for trial judge to allow an entire book into the jury room without sealing off the pages not admitted into evidence); *United States* v. *Kum Seng Seo*, 300 F. 2d 623 (3d Cir. 1962) (trial court permitted jurors to testify that a member of the jury had brought a newspaper article into the jury room and that the article had been passed around the room and discussed by some of the jurors); *Paz* v. *United States*, 462 F. 2d 740, 745, 746 (5th Cir. 1972) (attorneys and judge discovered during trial in jury room two books about narcotics traffic; Court ordered hearing into availability of books to jurors, the extent of their use, and "such other matters as may bear on the issue of the reasonable possibility of whether they affected the verdict"); *Gafford* v. *Warden*, 434 F. 2d 318 (10th Cir. 1970) (one juror went outside the evidence and checked certain facts which were relevant to a second degree murder case, such as the time a late show ended, and the time a certain gas station closed; Court reversed for a hearing because "[w]e have nothing before us upon which we can determine whether the jury did receive and consider evidence from extrajudicial sources. . . . Taken at face value the [juror's] affidavit [attached to the motion for new trial] shows at the very least the possibility that the jurors considered facts which did not emanate from the witness stand.")

[23] The standard usually enunciated in the cases is that a new trial is required if there was a "reasonable possibility" that the juror's condition affected the verdict. The application of this standard does not require an inquiry into whether the condition figures in the verdict, or actually influenced it; the court simply has to decide whether, given the nature of the condition and the nature of its manifestation, it can be said that the condition reasonably would not be expected to affect the verdict. This same standard applies in deciding when any irregularity has infected a jury's verdict. *Remmer* v. *United States*, 347 U.S. 227 (1954); *Paz* v. *United States*, 462 F. 2d 740, 746 (5th Cir. 1972); *Bates* v. *Preble*, 151 U.S. 149 (1894).

processes or deliberations of either juror Rush or of any other jurors. The trial court would simply have to call to the stand one or more jurors—not necessarily juror Rush—to testify as to whether or not juror Rush did or did not convey to other jurors any information similar to that contained in her post-verdict letter.[24]

Certainly a hearing of such limited scope does not raise the spectre of unreasonable intrusion into the inner sanctum of the jury room. In fact, after petitioner's motion for a new trial was filed in the District Court in this case, the court asked the parties to submit briefs suggesting the format that a hearing should take in the event the court convened a hearing. In response to that invitation, the Government suggested a procedure which, it acknowledged, "would provide maximum safeguards for the jurors' individual rights of privacy." That procedure is set out in the margin.[25] Petitioner agrees in general with the hearing procedure suggested by the Government. In light of the Government's acknowledgment that such a procedure

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[24] This Court long ago made it abundantly clear that while post-verdict inquiry could not be made as to "matters resting in the personal consciousness of one juror" and into the deliberative process, evidence could be taken as to "overt acts" which can be testified to by all jurors present. A juryman can thus testify as to any extraneous influence, although not as to how far that influence operated upon his mind. *Mattox* v. *United States*, 146 U.S. 140 (1892). See also *Gafford* v. *Warden*, 434 F. 2d 318 (10th Cir. 1970) ("Although the personal consciousness of a juror cannot be explored . . . , overt acts which are susceptible to the knowledge of other jurors may be established by the evidence of a juror.")

[25] "The Government suggests the following procedure in the event the Court decides that sufficient facts have been adduced to require a hearing:

> (1) Call witnesses (perhaps including juror Rush herself) to establish such facts as what jobs she has held, whether she has functioned adequately in ordinary social environments over a period of years, and the like; also to establish the facts surrounding the authenticity of the letter and the circumstances under which it was written.

would "provide maximum safeguards for the juror's individual rights of privacy," it is difficult to comprehend why no such hearing was conducted.

The absolute necessity of conducting a hearing—even of narrow scope—in a case like this is dramatically evidenced by the reliance placed by the lower courts on assumptions of fact about juror Rush that may simply not be true. For example, the lower courts premised their decision on the "facts" that juror Rush had never been ad-

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(2) On the basis of the evidence adduced in step 1 and on the basis of the letter, obtain expert opinion evidence (if required) as to the probable nature and extent of Miss Rush's mental disease (if any), and how it is likely to have affected her ability to comprehend the case and communicate about it (if at all).

(3) If, after steps 1 and 2, there is a *prima facie* showing of a mental condition which made juror Rush unable to comprehend the case or communicate intelligently about it, call witnesses from the jury to determine whether any such condition actually manifested itself or had any demonstrable affect on the deliberations.

(4) If required as a result of steps 1 through 3, adduce further psychiatric opinion evidence based both on the testimoney regarding the jury deliberations and on any appropriate interviews or tests which juror Rush may undergo.

The procedure outlined above would provide maximum safeguards for the jurors' individual rights of privacy. See *Miller* v. *United States*, 403 F. 2d 77 (2d Cir. 1968)."

The government did, of course, take the position that no hearing was required, but suggested the above procedure in the event one was ordered.

The Government advised the court to "defer any inquiry into the jury's deliberations and any psychiatric examination of the alleged incompetent juror herself, until the evidence clearly demonstrated the absolute necessity of such steps." Reply Memorandum for the United States of America Regarding Motion for a New Trial.

This proposal is certainly a reasonable one, although it seems to omit any inquiry of jurors to determine if extra-judicial, erroneous "evidence" was introduced by the juror into the jury room, unless such inquiry might be included within step (3)

judicated insane,[26] and that she has been steadily employed since 1944 and has been employed for the past four years by "Flower Fifth Avenue Hospital as a patient attendant."[27] On the record of this case, however, it cannot be assumed that Rush had never been adjudicated insane. Nor can it be assumed that her statements on *voir dire* concerning her alleged employment record were based on real, rather than imagined facts. It is at least equally likely that she was adjudicated; no one has ever checked the relevant records or asked her, since the judge precluded any such investigation.[28] Moreover, her statements on *voir dire* concerning her employment record are pregnant with ambiguity that cannot be cleared up without a hearing. At first she indicated that she had been employed at Flower Fifth Avenue Hospital for "a full year" and then for "four years." See Appendix 3, at pp. 59-60. Most significantly, however, she described herself as "a patient attendant" *ibid.* This phrase bears two equally plausible constructions: (1) that she is herself a *patient,* working part time as an attendant; or (2) that she is simply an attendant

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("call witnesses from the jury to determine whether any such condition actually manifested itself"). Presumably laymen would be more capable of reporting what juror Rush actually said, rather than interpreting the extent to which her conduct appeared bizarre. The Government does seem to understand, however, that a hearing need not delve at all into the thought or deliberative process of any jurors or of the jury as a whole.

[26] "In the instant case, however, where the juror's competency has not been determined in a separate and unrelated proceeding. . . ." Appendix 1, at p. 13.

[27] Appendix 2, at p. 39.

[28] Refusal to convene a hearing would seem all the more inappropriate in those jurisdictions, including the Second Circuit, which follow a policy of severely discouraging, and in some cases making subject to disciplinary action, attempts by defense counsel to investigate such claims on their own. See Miller v. United States, 403 F. 2d 77 (2nd Cir. 1968); United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967). Indeed, in this case, the trial judge issued an

who attends patients.[29] Many thousands of mental patients are, in fact, employed as patient-attendants in hospitals throughout the country.[30] And Flower Fifth Avenue Hospital—the hospital in which juror Rush claimed to be a "patient attendant"—does have a psychiatric service and apparently does have a program of employing psychiatric patients as attendants.

It is entirely possible—indeed, considering the contents of her letter, very probable—that juror Rush was, in fact, a mental patient at the very time—or shortly before—she was serving on the jury in this case. There is simply nothing in the record of this case that contradicts that possibility. The spectre of an actively hallucinating psychotic mental patient under an adjudication of insanity participating in the deliberation of petitioner's jury simply cannot be precluded on the basis of the record of this case.

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order that the juror not be contacted, directly or indirectly. Counsel for Ostrer would have been satisfied with that order, of course, had it not been followed by a subsequent refusal to hold a hearing and seek evidence under the guidance and control of the judge.

[29] Of course, all attendants attend patients, so this latter construction would require a redundancy. The Court of Appeals, however, subtly transformed the "patient attendant" response (A. 39) into the description "nurse's aide" (A. 44) without giving any thought as to what the phrase would mean had the Court stenographer hyphenated "patient-attendant."

[30] "As yet, neither the United States Department of Labor nor any other organization has undertaken a comprehensive survey of the extent of patient labor in American mental institutions. Nonetheless, a 1972 study of 154 institutions in 47 states, which represent 76 percent of existing facilities for the mentally retarded, found that 32,180 of 150,000 residents were participating in a work program, 30 percent of these receiving no pay at all, and an additional 50 percent receiving less than $10 per week. Research in Ohio indicates that as of January, 1973, 1,237 out of 8,000 residents in facilities for the retarded were 'working residents', laboring as a group over 40,000 hours per week. And a 1969 study conducted by the Pennsylvania Department of Public Welfare disclosed a resident working force of 3,040 out of a total

Nor is this possibility precluded by the trial judge's retrospective recollection that he "did not notice anything unusual about her".[31] As this Court said in the related context of an incompetency determination:

> "While Robinson's demeanor at trial might be relevant to the ultimate decisions as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." *Pate* v. *Robinson*, 383 U.S. 375, 386 (1966).

Nor is it significant that "nothing unusual concerning her [was] brought to [the trial judge's] attention by either the attorney or juror".[32] In the first place, absent a hearing, it cannot be known whether the jurors observed anything "unusual" about her which they did not communicate to the judge. More fundamentally, however, the dangers are even greater if the jurors did not observe anything unusual about juror Rush—if they were not aware that she was hallucinating.[33] Such a situation would increase the likelihood that the jurors might have been influenced

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population of 11,923 in nine state schools and hospitals for the mentally retarded." Friedman, P., *The Mentally Handicapped Citizen and Institutional Labor*, 87 Harv. L. Rev. 567, 568 (1974), and numerous authorities cited therein.

[31] Appendix 1, at p. 22.

[32] Appendix 1, at p. 22.

[33] In reversing a trial judge's finding that a defendant was competent, based upon lay observations of his actions, the Court of Appeals for the Fifth Circuit said:

> "The only evidence to the [effect that the defendant was competent] came from laymen, all of whom testified . . . to nothing more than that they had never observed an abnormal act on the part of Gray, and none of whom had any 'prolonged and intimate contact with the accused.' [Citation omitted.] *Their testimony is insufficient to establish Gray's competency in the face of unimpeached expert testimony to the contrary.*" (Emphasis added.) *United States* v. *Gray*, 421 F. 2d 316, 318-319 (5th Cir. 1970).

by extra-judicial facts brought to their attention by juror Rush—facts which they may have believed had a real rather than an imagined basis.

Without some kind of evidentiary hearing, it simply cannot be assumed that: (1) juror Rush was not under an adjudication of insanity at the time of the trial; (2) her employment record was as she stated; (3) she did not communicate to other jurors "information" that "appear[ed] before" her or matters that she saw "before it happen." In light of the evident need for a hearing to resolve these issues and in light of the Government's explicit acknowledgment that a hearing of the kind it proposed would "provide maximum safeguards for the jurors' individual rights of privacy," petitioner respectfully requests this Court either to remand the case for such a hearing or to reverse the conviction and remand for a new trial.

III. The Decision Below, Allowing to Stand the Prosecutor's Comment on the Defendant's Failure to Present Testimony, Annihilates this Court's Decision in Griffin v. California.

Petitioner attempted at trial to obtain a severance from his co-defendant, because the latter had an infamous reputation as a high underworld figure, and also because the petitioner wanted to testify on his own behalf but feared doing so in the presence of a jury in view of a minor prior criminal conviction. But when the co-defendant objected, the trial judge denied the motion. Thus, petitioner went forward reluctantly with a jury, and also reluctantly, decided not to testify.

This latter decision, forced upon petitioner by the denial of the motion for severance and for a jury-waived trial, was taken advantage of by the prosecutor in his summation to the jury. The critical part of the Government's case involved testimony by the initiator of the scheme, one

Hellerman, an indicted co-conspirator who had turned government witness, as to the contents of a conversation at which the initiator claimed he informed petitioner of the stock manipulation scheme. Were it not for this testimony, the evidence could as easily have been interpreted as indicating that petitioner was a victim of, rather than a knowing perpetrator of, the illegal scheme.[34] The *scienter* evidence thus rested on the initiator's testimony of a single meeting, concerning which only he and the petitioner were in a position to testify. In the absence of testimony by petitioner, the initiator's testimony necessarily went uncontradicted.

In his closing, government counsel addressed the jury as follows:

> "The defense has alluded to the fact, and his Honor will tell you, that it is the law that a defendant does not need to call any witnesses whatsoever; the government has the obligation to prove its case beyond a reasonable doubt. . . . However, the defense, just like the government, has the capability of calling witnesses, and there are witnesses who are available to the defense, as well as to the government. I think his Honor will instruct you that you are entitled to draw an inference, if you find it is appropriate to do so, or you may draw no inference at all. [Objection here by Ostrer's trial counsel overruled.] Now, the fact that nobody disputed Hellerman's story directly or on cross examination or in any other way to the facts as opposed to proper cross examination directed to show that he was an evil fellow, you may find is a terribly significant factor."

[34] The petitioner did, in fact, lose a substantial amount of money in the scheme, as did other investors.

At this point Ostrer's counsel moved for a mistrial "in view of the statement made by the prosecutor." Again his objection to the comment was overruled, and his motion was denied.

The court below found no prejudice in the statement.[35] The Second Circuit's refusal to reverse, even in such an egregious case as this, is simply the latest in a long series of cases in which that Court, since and in the face of this Court's decision in *Griffin* v. *California*, 380 U.S. 609 (1965), has eroded the protection against comment to which non-testifying defendants are clearly entitled.

The Second Circuit has been employing a variety of devices to circumvent the clear command of *Griffin*. For instance, the court routinely interprets prosecutors' remarks as referring to issues different from the failure of the accused to testify. See *United States* v. *Nasta*, 398 F. 2d 283 (2d Cir. 1968); *United States* v. *Marcus*, 401 F. 2d 563 (2d Cir. 1968); *United States* v. *Hart*, 407 F. 2d 1087 (2d Cir. 1969); *United States* v. *Curiale*, 414 F. 2d 744 (2d Cir. 1969); *United States ex rel. Leak* v. *Follette*, 418 F. 2d 1266 (2d Cir. 1969); *United States* v. *Smart*, 448 F. 2d 931 (2d Cir. 1971); *United States* v. *Lipton*, 467 F. 2d 1161 (2d Cir. 1972).

Frequently, too, the Court refuses to reverse if defense counsel did not raise a prompt objection or did not request curative instructions. See *United States* v. *Nasta*, *supra*; *United States* v. *Marcus*, *supra*; *United States ex rel. Walls* v. *Mancusi*, 406 F. 2d 505 (2d Cir. 1969); *United States ex rel. Satz* v. *Mancusi*, 414 F. 2d 90 (2d Cir. 1969); *United States* v. *Smart*, *supra*. On the other hand, if the

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[35] The court said that there were many people involved in the scheme who could have testified. But the Court overlooked the fact that on the issue of *scienter*, only the petitioner and Hellerman could give relevant testimony. The prosecutor's object in commenting seems clear enough.

trial court does instruct the jury on the defendant's rights, the court rules that such instruction nullifies any prejudice. See *Cole* v. *Mancusi*, 429 F. 2d 61 (2d Cir. 1970).

Additionally, the court below has held several times that a prosecutor's remark was non-prejudicial or harmless error to the defendant. The rationales behind such holdings vary. In *United States ex rel. Satz* v. *Mancusi, supra*, the court held that the prosecutor's remark that the defendant had never vouched for his own credibility was harmless error because the evidence overwhelmingly pointed to the defendant's guilt, even though the first jury to hear the case was unable to reach a verdict.

The lower court itself acknowledged that it is an extremely rare occasion on which the Second Circuit would recognize that reversible error had been committed when the prosecutor or court comments on the failure of the defendant to testify. The court announced that, "remarks concerning lack of contradiction are forbidden only in the exceedingly rare case" and reasserted that the court "will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them." Appendix 2, at pp. 46-47. Such laxity in the interpretation and application of *Griffin* in the Second Circuit nurtures the frequency of such prejudicial comments by prosecuting attorneys who hardly risk reversal by their actions and thus continue to comment.

The practice in the Second Circuit now is similar to that which prevailed in the First Circuit until the Court of Appeals for the First Circuit stated its frustration with the frequency of such prosecutors' comments and held that such comments would in the future constitute prejudicial error. *United States* v. *Flannery*, 451 F. 2d 880 (1st Cir.

1971). In *Flannery* the court included within the definition of prejudicial error a situation, such as in the case at bar, where the prosecutor argues to the jury that certain testimony was uncontradicted, where only the defendant could have been available to contradict it.

Here, the defendant was the only person who could contradict Hellerman's testimony on *scienter*. The prosecutor's comment to the jury was unambiguous and its purpose transparent. Defense counsel made two immediate and strenuous objections (the prosecutor having repeated his comment after the first objection was overruled), and the trial judge refused twice to deliver an immediate curative [36] instruction.

If the lower court's decision in this case is allowed to stand, *Griffin* will have been virtually abrogated in the Second Circuit. [37]

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[36] The court below stated that the danger of such a comment was "neutralized" in this case by a "prompt corrective instruction to the jury" given by the trial judge. This finding is puzzling in light of the transcript of the proceedings, quoted at p. 29, ***supra***, showing clearly that two immediate objections by defense counsel were overruled in the jury's presence, and that only after those rulings did the trial judge, in response to counsel's entreaty, tell the jury that "the defense has no obligation to produce any witnesses." And even then, the prosecutor later in his summation commented for a third time, noting that the jurors could draw an inference from the defendant's failure to call witnesses to contradict the Government's witness. Once again, defense counsel's prompt objection was overruled.

[37] It is perhaps ironic to note that had the petitioner's severance motion been granted and had he been allowed the trial-by-judge that he requested, he would not have been prejudiced either by the delusional juror problem or by the prosecutor's comment on his failure to testify. (The record is clear that Ostrer would have testified had he been allowed to waive trial by jury.) The problem could have been avoided even without severance if, at the same joint trial, the judge served as fact finder for petitioner and the jury as fact finder for the co-defendant who demanded a jury

Conclusion.

For the foregoing reasons, petitioner respectfully requests this Court to grant the instant petition and either to set the case down for argument, or to remand the case for a new trial, or for the kind of hearing that the Government has acknowledged "would provide maximum safeguards for the jurors' individual rights of privacy."

Respectfully submitted,

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trial. This latter possibility is discussed in *United States* v. *Farries*, 459 F. 2d 1057, at 1061 (3d Cir. 1972). The dangers inherent in forcing a defendant to go to trial by jury where his joint defendant is a well-known underworld figure and where his right to testify is hindered by even a minor prior conviction, were responsible for the court granting a jury-waived trial to a defendant even over the Government's strenuous objections in *United States* v. *Schipani*, 44 F.R.D. 461, 463-64 (E.D.N.Y. 1968).

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Supreme Court of the United States

OCTOBER TERM, 1973,

No. 73-1631

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Appendix to
Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit.

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Appendix 1.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
PLAINTIFF,

against 71 CR. 558 DNE

JOHN DIOGUARDI and LOUIS OSTRER,
DEFENDANTS.

EDELSTEIN, Ch. J.

Opinion.

Defendants John Dioguardi and Louis Ostrer were indicted on May 27, 1971, and brought to trial on January 4, 1973, for conspiring to violate and for violating the federal securities laws [1] and regulations [2] and the federal mail fraud statute. [3] On January 26, 1973, after three days of deliberations, a jury returned verdicts of guilty against

[1] Section 17(a) of the Securities Act of 1933, prohibiting fraud in the sale of securities. 15 U.S.C. § 77q(a) (1970). Wilful violation of this section is made criminally punishable by section 24 of the Securities Act of 1933, 15 U.S.C. § 77x (1970).

[2] Securities and Exchange Commission Rule 10b-5, prohibiting fraud in the purchase and sale of securities. 17 C.F.R. Section 240.10b-5, promulgated under 15 U.S.C. § 78j(b) (1970). Wilful violation of this rule is made criminally punishable by section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff (1970).

[3] 17 U.S.C. § 1341 (1970), the federal mail fraud statute.

both defendants.[4] Defendants have now moved for a new trial, pursuant to F.R.Cr.P. 33,[5] on the ground that one of the jurors suffered from "a mental infirmity making her incapable of rendering efficient jury service" within the meaning of 28 U.S.C. 1865(b)(4).[6]

In support of their motion, defendants rely upon a letter which was sent to Dioguardi by the juror in question. The letter portrays the juror as a person with religious feelings who believes herself to be a clairvoyant. This clairvoyance, according to the letter, has enabled the juror to conclude that Dioguardi is basically a good person. (The juror repeated the phrase " . . . I saw the good

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[4] The jury found Ostrer guilty of 11 of the 17 counts submitted to them for their consideration; and Dioguardi guilty of 4 of the 19 counts submitted to them for their consideration.

[5] Rule 33 of the Federal Rules of Criminal Procedure states:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.
> As amended Feb. 28, 1966, eff. July 1, 1966.

[6] Section 1865(b)(4) states, in pertinent part:

> (b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—
>
> . . . . . .
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

within you. . ."). Nevertheless, the juror affirms her belief that Dioguardi is guilty ("Your mistake your [sic] guilty."); admonishes him for becoming involved with criminals ("Why you let such a relationship exist between you and a man like Hellerman?"[7] and suggests that he should repent and be saved. ("If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost.")

Defendants have also submitted six letters from six different psychiatrists and an affidavit from a seventh psychiatrist. Based only upon an analysis of the juror's letter and, in some instances, an assumption of the juror's religious feelings, cultural background and intelligence level, the doctors offered, in various ways, their opinion that the juror is, and was during trial, hallucinatory, delusional psychotic, grandiose and suffered from guilt feelings and a persecution complex; and they attempted to make the legal determination that the juror was not mentally qualified to serve on a jury.

Defendants have requested that this court either (a) hold a hearing "with necessary mental examination" to determine whether the juror was unqualified to serve, and to grant a new trial "should the juror be found to have been unqualified;" or (b) grant a new trial even if the court refuses to hold a hearing.

The demand for a new trial based upon a post-verdict attack on a juror's mental competency is an issue of first impression in this circuit. The problem, however, has been considered by the highest tribunals of fourteen states,[8]

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[7] Michael Hellerman was the admitted architect of the scheme for which the defendants were convicted and was a key witness for the prosecution.

[8] *Arizona*: Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939); *Arkansas*: Brown v. State, 219 Ark. 647, 243 S.W. 2d 938 (1951); Grand Lodge A.O.U.W. of Ark v. Wood, 113 Ark. 502, 168 S.W.

an intermediate appellate court in one other state,[9] and by the Courts of Appeals for the First Circuit [10] and Third Circuit. [11] The decisions rendered by these courts all are to the effect that a post-verdict *inquiry* into a juror's mental competency will not be permitted unless the party seeking to set aside the jury's verdict makes a strong showing as to the existence of the alleged mental infirmity. At a minimum, this showing should be sufficient to overcome the legal presumption that all men are sane [12] An analysis of the relevant cases reveals no precise formula

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1070 (1914); *Colorado*: Austin v. People, 106 Col. 506, 107 P.2d 798 (1940) *Georgia*: Wall v. State, 126 Ga. 549, 55 S.E. 484 (1906), (the Georgia Court of Appeals, an intermediate appellate court, reaffirmed the *Wall* decision in Newton v. State, 66 Ga. 103, 17 S.E. 2d 102 (Ct. App. 1941)); *Illinois*: Mackin v. People, 115 Ill. 312, 3 N.E. 222 (1885); *Indiana*: Douthitt v. State, 144 Ind. 397, 42 N.E. 907 (1896); *Massachusetts*: Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911), *aff'd.* Jordan v. Massachusetts, 225 U.S. 167 (1912); *Montana*: State v. Bucy, 104 Mont. 416, 66 P.2d 1049 (1937); *New Jersey*: Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); *New Mexico*: State v. Eskildson, 36 N.M. 238, 13 P.2d 417 (1932); *Tennessee*: Durham v. State, 182 Tenn. 577, 188 S.W. 2d 555 (1945); *Texas*: Ex Parte Lovelady, 152 Tex. Crim. 93, 207 S.W. 2d 396 (1947), *cert. granted* 333 U.S. 867, *cert. dismissed* 333 U.S. 879 (1948); McKenzie v. State, 116 Tex. Crim. 395, 11 S.W. 2d 172 (1928); Carter v. State, 102 Tex. Crim. 517, 278 S.W. 840 (1925); *Washington*: State v. Welty, 65 Wash. 244, 118 P. 9 (1911); *West Virginia*: State v. Camp, 110 W. Va. 444, 158 S.E. 664 (1931).

[9] *Missouri*: Eastman Kodak Stores, Inc. v. Summers, 377 S.W. 2d 476 (Kan. City Ct. App. 1964).

[10] Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954).

[11] United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952), *cert. denied* 344 U.S. 913 (1953).

[12] *See, e.g.* Davis v. United States, 165 U.S. 373, 377-378 (1897); Davis v. United States, 160 U.S. 469, 486-7 (1895); State v. Camp, 110 W.Va. 444, 158 S.E. 664, 667 (1931).

by which to measure the standard of proof necessary to warrant a post-verdict investigation. They do reveal, however, a difference between a sufficient and an insufficient showing.

These cases can be divided into three categories, ranging in degree from the strongest to the weakest showings which have been made in attacking a juror's competency. The strongest showing is illustrated by fact patterns in those cases in which the juror, prior to trial, had been adjudged mentally incompetent; had spent time in a hospital for the mentally ill; and had not been legally restored to competency during the period of his jury service. In such cases, the mere adjudication of incompetency, without a restoration to competency, regardless of the period of time which had elapsed between the date of the adjudication and the date of jury service, was sufficient to overcome the presumption that the juror was sane during the trial [13] In these circumstances, the courts have held a post-verdict investigation to ascertain the extent to which the disability existed during trial, and the effect the disability had on the juror's consideration of the facts of the case. [14]

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[13] Indeed, unless there has been a restoration to competency, there is a rebuttable presumption of continued incompetency. Davis v. United States, 165 U.S. 373, 377-378 (1897); Tarvestad v. United States, 418 F.2d 1943, 1050-51 (8th Cir. 1969), *cert. denied* 367 U.S. 935 (1970); Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964); Kitchens v. United States, 372 F.2d 757, 760 (10th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); Gunthers v. United States, 215 F.2d 493, 496 n. 12 (D.C. Cir. 1954); Brown v. State, 219 Ark. 647, 243 S.W.2d 938, 939 (1951); State v. Bucy, 104 Mont. 416, 66 P.2d 1049, 1050 (1937).

[14] *For example*, in Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939), the juror, several months before trial, had been formally declared incompetent to manage his business affairs and had remained under the disability throughout the trial. At the hearing evidence was adduced which indicated that the juror was an alcoholic, that his business was being ruined as a result of his affliction, that his income was being consumed by his habit, and that

The second category of cases involves jurors who have been declared insane shortly after the verdict was rendered.

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the declaration of incompetency was an attempt to save both his money and his business. The court further found that when sober the juror was of sound mind and normal intelligence. Declaring that "there was nothing to show that at the time of trial his condition was not normal," (96 P.2d at 283) the court held that the juror's disability did not adversely affect his ability to properly perform the functions of a juror. For other cases involving pretrial adjudications of incompetency in which the court conducted a post-verdict investigation, *see* Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914 ("several months" before trial the juror had been declared insane; had been sent to a mental hospital had remained there for "a short period;" and had been "paroled;" but had never been "legally emancipated from the disability of instanity"); Austin v. People, 106 Col. 506, 107 P.2d 798 (1940) (16 months before trial, the juror had been adjudged a mental incompetent, but had never been institutionalized nor restored to competency); Brown v. State, 219 Ark. 647, 243 S.W. 2d 938 (1951) (approximately 2 years before trial the juror had been adjudged insane by the probate court; had been confined in a mental hospital for 3 months; and had been released without a judicial restoration to sanity); Ex Parte Lovelady, 152 Tex. Crim. 93, 207 S.W. 2d 396 (1947), *cert. granted*, 333 U.S. 867, *cert. dismissed* 333 U.S. 879 (1948) (the juror had been adjudged insane approximately 7 years before the trial, had been confined in a hospital for the insane; and had been discharged "soon after his confinement" without having been legally restored to sanity); Douthitt v. State, 182 Tenn. 577, 188 S.W. 2d 555 (1945) (the juror had been confined for a short period in an "insane hospital" approximately 8 years before trial and had been discharged as "improved"); State v. Bucy, 104 Mont. 416, 66 P.2d 1949 (1937) (approximately 10 years before trial the juror had been declared insane; had been confined in an insane asylum for less than 2 months; and had been released but had never been judicially restored to competency); Eastman Kodak Stores, Inc. v. Summers, 377 S.W. 2d 476, 481 (Kan. City Ct. App. 1964) (approximately 20 years before trial the juror had been "adjudicated to be a person of unsound mind and had never been restored;" and had, thereafter, been treated for epilepsy). Three other cases involved similar facts, but no time periods were stated. Durham v. State, 182 Tenn. 577, 188 S.W. 2d 555 (1945); Carter v. State, 102 Tex. Crim. 517, 278 S.W. 840 (1925); Newton v. State, 66 Ga. 103, 17 S.E. 2d 102 (Ct. App. 1941).

The adjudications were by an independent tribunal, and the proceedings were completely unrelated to the post-verdict investigation of the jurors' qualifications. As in the first category of cases, the presumption of sanity had been overcome. However, an adjudication of incompetency does not determine a person's mental capacity prior to the determination. Yet, the inference is clear that the underlying causes of the incompetent condition existed before the adjudication. Thus, in this category of cases, due process requires[15] that there be a hearing to establish whether the disability existed during trial, and if it did exist, the effect it had on the juror's deliberations.[16]

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[15] Jordan v. Massachusetts, 225 U.S. 167, 174 (1912) aff'g. Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911). In Jordan, the juror was found to be insane and was committed to an "insane hospital" four days after the verdict was rendered. After a lengthy hearing the presiding justice denied defendant's motion for a new trial, ruling that "a fair preponderance of all the evidence" indicated that the juror was possessed of "sufficient mental capacity during the entire trial" to enable him to render an intelligent verdict. Quoted in 93 N.E. at 814. Both the Supreme Judicial Court of Massachusetts and the United States Supreme Court affirmed. Although the precise question before the Supreme Court involved the propriety of using the "preponderance of the evidence" standard, the Court noted that the holding of a hearing complied with the due process requirement.

[16] State v. Camp. 110 W.Va. 444, 158 S.E. 664 (1931). (The juror became insane the day after the verdict was rendered and was hospitalized two weeks thereafter); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901) (the juror became insane "some days" after the verdict); Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941) (the juror began evidencing symptoms of a mental illness 6 days after the trial's conclusion and was declared, 2 days later, to be suffering from a type of insanity "which conjures up an imaginary world and results in a loss of 'contact with reality.'" 19 A.2d at 218); State v. Welty, 65 Wash. 244, 118 P. 9 (1911) (The juror had been twice adjudged insane and committed to an insane asylum prior to trial; and not been restored to sanity at the time of trial; and 5 months after trial had been re-committed to the asylum).

Absent the type of showing demonstrated in the first two categories, the courts have been extremely reluctant to invade the privacy of the jury room. Thus, the Court of Appeals for the First Circuit, in *Peterman* v. *Indian Motorcycle Co.*, 216 F.2d 289 (1st Cir. 1954), the Court of Appeals for the Third Circuit, in *United States ex rel. Daverse* v. *Hohn*, 198 F.2d 834 (3rd Cir. 1952), and the Supreme Court of New Mexico, in *State* v. *Eskildson*, 36 N.M. 238, 13 P.2d 417 (1932), approved the trial court's refusal to hold an evidentiary hearing absent an adjudication of incompetency. In *Peterman*, the movants offered to prove that

> . . . the juror in question, because of mental disturbance, [had] been receiving disability compensation from the Veterans Bureau, that he [had] difficulty in sleeping and concentrating; that his memory [was] not good; that he [had] had depressed periods during which he entertained the idea of suicide; *that he* [*had*] *had to undergo treatment for anxiety reaction to a psychic episode expressed by auditory hallucinations; that he has been under the care of a psychiatrist for an extended period, with little prospect of an early overcoming of his difficulties.*

216 F.2d at 293 (emphasis added). Yet, Judge Wyzanski of the United States District Court for the District of Massachusetts refused to hold an evidentiary hearing. According to the opinion of the Court of Appeals, Judge Wyzanski's reason was based upon the fact that the offer of proof, "taken at its face value," did not present "a sufficient ground for impeaching a verdict once returned" because it "contained no suggestion that the juror was insane or had at any time been confined in a sanitorium 'or was so incapacitated that he did not perform as adequately

as many people do ordinary occupational tasks.'" *Id.* The Court of Appeals noted that Judge Wyzanski observed the juror during the trial and that he did not get the impression that the juror was incompetent. In its affirmance, the Court of Appeals indicated its approval of "the strong policy against the too-ready impeachment of jury verdicts on the basis of such afterthoughts suggested by a disappointed litigant." *Id.*

Similarly, in *Eskildson*, defendants sought to establish a juror's mental incompetency through the testimony of a psychiatrist. The trial court, however, refused to hold an evidentiary hearing because there had not been "an adjudication that settled [the juror's] status." 13 P.2d at 421. The Supreme Court of New Mexico, while sanctioning the adjudication requirement adopted by the trial court, suggested that a hearing might also be appropriate if the trial judge believed, based upon his observations of the juror during trial, that the juror was incompetent.[17]

Finally, the Third Circuit's opinion in *Daverse*, although not precisely on point, is consonant with the policy reflected in *Peterman* and *Eskildson*. In *Daverse*, the defendant attempted to amend a paragraph of a petition for habeas corpus by adding an allegation that the juror suffered from a mental disease. This proposed amendment, however, was framed in uncertain, rather than specific, language ("... [the] juror ... *may* be suffering from a mental disease. ...") 198 F.2d at 937 (emphasis added). Focusing upon the failure to allege "specifically that [the

[17] *But see*, McKenzie v. State, 116 Tex. Crim. 395, 11 S.W. 2d 172 (1928) in which a post-verdict inquiry was conducted notwithstanding the absence of an adjudication of incompetency. The juror's mental competence was challenged on the basis of an "application, filed by the juror, for compensation on the ground of nervous and mental disability incurred during the World War." 11 S.W. 2d at 179. It does not appear that the parties put into issue the propriety of conducting a post-verdict investigation.

juror] was in fact mentally incompetent or 'insane,' " the Court of Appeals affirmed the District Court's refusal to allow the amendment. In so doing, the court stated:

> If a juror's mental competence is to be attacked at the late stage offered by a habeas corpus proceeding, the charge must be made in much more certain terms and not on a tentative basis. A fishing expedition into a juror's competency may not be employed as a basis to attack a conviction valid on its face. To rule otherwise would be to strike a serious blow at the sanctity of the jury system for any juror, who it was alleged might be suffering from paranoid tendencies, could in effect be put on trial as to his mental competence. We cannot sanction such a course.

198 F.2d at 938 (citation omitted). Clearly, something more than just a bare statement of incompetency is demanded. At a minimum, a party attacking a juror's qualifications must make an offer of proof which, as the First Circuit stated, suggests "that the juror was insane or had at any time been confined in a sanitorium 'or was so incapacitated that he did not perform as adequately as many people do ordinary occupational tasks.' " 216 F.2d at 293. It would be myopic to read the *Daverse* opinion as requiring anything less than a strong showing of mental incapacity. It makes little difference, absent such a strong showing, whether movants charge that a juror *is* suffering from a mental disease or that the juror *may be* suffering from a mental disease. In both instances, the effect of defendant's attack is the same: permission to employ a "fishing expedition into a juror's competency" would be required. Such an expedition cannot be tolerated.

A comparison of the offer of proof in the case at bar with the offers made in the cases above should make it abun-

dantly clear that the defendants' offer of proof is insufficient to warrant a post-verdict inquiry into the juror's mental competency. Since there has been no adjudication of incompetency, this case comes within the weakest of the three categories discussed above. Even within this category, the showing is extremely weak. In *Peterman,* for example, the offer of proof was much stronger than the offer made here. There, the allegations were, in effect, that the juror had a history of mental disturbances, and had been, prior to and throughout the trial, under the care of a psychiatrist. Yet, Judge Wyzanski and the First Circuit were in accord that these allegations, even if true, would not warrant the impeachment of the verdicts. 216 F.2d at 293. Here, there is no indication that the juror has a history of psychiatric disorders or that the juror has undergone psychiatric treatments. At best, the defendants' position is comparable with the defendant's position in *Daverse*: a bare allegation of incompetency combined with a request that the court conduct an investigation. To permit a post-verdict inquiry based upon defendants' offer of proof would be to accept the proposition that a fishing expedition may be employed to attack a conviction valid on its face. This cannot be countenanced, particularly in light of *Peterman* and *Daverse.*

Moreover, based upon an examination of the general case law governing a post-verdict inquiry into a juror's qualifications, it is clear that a hearing is not required. The purpose of a hearing is not to determine whether or not the claimed disability does exist. Rather, the function of a hearing is to ascertain the extent to which the disability existed during trial, and the effect the disability had upon the juror's deliberations. This view finds support in the Supreme Court's opinion in *Remmer* v. *United States,* 347 U.S. 227 (1954). During the trial in *Remmer,* an improper

communication was made to a juror and was reported immediately to the court. Improper communications, such as those involved in *Remmer,* have been deemed to be so presumptively prejudicial as to require a new trial.[18] Yet, the trial court never informed the defendant-petitioner of the incident. Instead, based upon the results of a requested F.B.I. investigation, the court concluded that the incident was harmless. Upon learning of these events after trial, the defendant-petitioner moved for a new trial. Without holding a hearing, the trial court denied the motion and the Ninth Circuit affirmed. 205 F.2d 277 (9th Cir. 1953). The Supreme Court, however, held that a hearing was necessary—not to determine whether the incident occurred —but rather to "determine the circumstances [surrounding the incident], the impact thereof upon the juror, and whether or not it was prejudicial." 347 U.S. at 230.

This concept of the limited purpose of a hearing is also suggested by the Second Circuit's decision in *United States* v. *Silverman,* 449 F.2d 1341 (2d Cir. 1971). There the court indicated that a hearing would be necessary—again, not to determine whether a claimed disqualification existed—but rather to determine whether "the claimed disqualification might have adversely affected the challenged juror's ability to decide the case intelligently." 449 F.2d at 1344. In *Silverman,* an income tax evasion case, the juror's inability to read and write English was not disputed. At the hearing, therefore, the only question facing the court was whether this disability precluded the juror from rendering a fair and impartial verdict.

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[18] This principle had been enunciated prior to *Remmer,* Mattox v. United States, 146 U.S. 140, 148-150 (1892), Morley v. Cranmore Skimobiles, 67 F.Supp. 812 (D.N.H. 1946); and has been reaffirmed since *Remmer,* Parker v. Gladden, 385 U.S. 363 (1963) (per curiam); Marshal v. United States, 360 U.S. 310 (1959).

Similarly, in other cases involving a post-verdict attack upon a juror's qualifications, the existence of the disabling condition was not in issue, for the factors relied upon as being responsible for the disabling condition were readily evident.[19] Thus, where the juror suffered from a physical impairment, the existence of the impairment was not disputed. Where the juror was unable to read or write, this inability was not controverted. Where the juror was an alien, infant or convicted felon, the alienage, infancy or conviction of the juror was not in issue. Where the juror had engaged in some form of misconduct, the fact that the misconduct occurred was not questioned. And where the juror's mental competency was determined in a separate and unrelated proceeding, mental capacity was not contested. What was questioned and what was contested though, was the extent to which the disqualifying factor tainted a juror's deliberations and prevented him from rendering a fair and impartial verdict.

In the instant case, however, where the juror's competency has not been determined in a separate and unrelated proceeding, the court would be constrained to perform the additional task of delving into the mind of the juror and making the initial determination of whether or not the

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[19] *See, e.g.*, Raub v. Carpenter, 187 U.S. 159, 161-162 (1902) (infancy, felony conviction); United States v. Silverman, 449 F.2d 1341 (2nd Cir. 1971) (inability to read and write English); United States v. DeLeon, 462 F.2d 170 (5th Cir. 1972) (juror under indictment); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) (improper communications to jury); Ford v. United States, 201 F.2d 300 (5th Cir. 1953) (juror convicted of felony); Ryan v. United States, 191 F.2d 779 (D.C. Cir. 1951), *cert. denied sub. nom.*, Duncan v. United States, 342 U.S. 928 (1951) (improper communications to jurors); Faith v. Neely, 41 F.R.D. 361 (N.D.W. Va. 1966) (juror misconduct, intoxication); Hollingsworth v. Duane, 4 U.S. (4 Dall.) 353 (Pa. Dist. 1801) (alienage); Lindsay v. State, 189 Tenn. 355, 225 S.W. 2d 533 (1949) (deafness); Batson v. State, 216 Ala. 275, 113 So. 300 (1927) (alienage).

juror was mentally competent.[20] Such a probe was not undertaken in *Peterman, Eskildson* and *Daverse;* and the court would be ill-advised to undertake such a probe here. Testimony would be necessary at the very least, not only from the subject juror regarding her deliberations, but also from her fellow jurors, regarding the nature and extent of the subject juror's participation in the deliberations.[21] Yet, such a probe militates against the well-estab-

[20] Although the defendants have requested that the juror undergo a mental examination, it is highly doubtful whether the court has the authority to order such an examination. The Supreme Court has held that federal courts do not have the common law power to order such an examination; Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891); *see also* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Camden and Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900); and no statute can be found which authorizes it. Indeed, in civil cases, the court may only order, upon a motion for good cause, a party or a person under the legal control of party to submit to a mental examination. F.R.Civ.P.35(a). *See, e.g.* Schlagenhauf v. Holder, 379 U.S. 104 (1964). Similarly, in criminal cases, only the defendant is subject to the court's control. 18 U.S.C. §§ 4244, 4245. *See also* Rees v. Peyton, 384 U.S. 312 (1965) (per curiam); United States v. Baird, 414 F.2d 700, 710 (2d Cir. 1969), *cert. denied*, 396 U.S. 1026 (1970); United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); United States v. Albright, 388 F.2d 719, 722-724 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33, 39 (8th Cir. 1967); Pope v. United States, 372 F.2d 710, 721 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968). No authority has been cited—indeed, no authority has been found—which permits the court to order a person who is neither a party nor a person under the control of a party in a judicial proceeding, to undergo a mental examination.

[21] It has been held that where a juror was able "to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion," a new trial will not be granted. Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809, 814-815 (1911), *aff'd* Jordan v. Massachusetts, 225 U.S. 167 (1912). *See* Ex Parte Lovelady, 152 Tex. Crim. 93, 207 S.W. 2d 396, *cert. granted*, 333 U.S. 867, *cert. dismissed*, 333 U.S. 873 (1948); Anderson v. State, 54 Ariz.

lished general rule which inhibits a court from inquiring "in any way whatever as to what occurred during the jury's deliberations." *United States* v. *Grieco,* 261 F.2d 414, 415 (2nd Cir. 1958), *cert. denied* 395 U.S. 907 (1959). Indeed, it is axiomatic that jurors are incompetent to testify as to matters which would impeach their verdict, regardless of the means employed.[22] Hence, courts have consistently refused to consider letters and affidavits of jurors which attempt to impeach their verdict.[23]

These general rules, however, are not absolute. The Supreme Court, having recognized that the adherence to inflexible rules is incompatable with the administration of justice, has relaxed the rigidity of these rules in order to protect the defendant's Sixth Amendment right to a fair and impartial jury. *McDonald* v. *Pless,* 238 U.S. 264, 268-269 (1915). Nonetheless, post-verdict inquiries remain limited to extraordinary circumstances in which fundamental incompetency or actual bias is shown.[24] Thus, to

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387, 96 P.2d 281 (1939); State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); Mackin v. People, 115 Ill. 312, 3 N.E. 222 (1885). *See also* United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971) (in which the Court of Appeals stated that a juror must be able "to decide a case intelligently"); Ford v. United States, 201 F.2d 300, 301 (5th Cir. 1953). In those circumstances in which a hearing might be required, testimony from the subject juror and the other jurors would be necessary to determine whether a juror deliberated intelligently.

[22] McDonald v. Pless, 238 U.S. 264 (1915); Hyde v. United States, 225 U.S. 347 (1912); Mattox v. United States, 146 U.S. 140 (1892).

[23] The refusal to receive affidavits from jurors attempting to impeach their verdict can be traced to Lord Mansfield's ruling in 1785, Vaise v. Delaval, I.T.R. 11 (1785); and has been "universally followed" in this country. *McDonald,* 238 U.S. at 268.

[24] *See, e.g.* Dennis v. United States, 339 U.S. 162, 168 (1950); Frazier v. United States, 335 U.S. 497, 512-514 (1948); Mattox v.

come within this high standard, "[t]here must be a showing of a *prima facie* case sufficient to satisfy the judge that the [exposure of the jury's discussions during deliberations] should be let in." *Clark* v. *United States*, 289 U.S. 1, 14 (1932). The alleged disability must be "so obvious a disqualification or so inherently prejudicial as a matter of law . . . to require the court, of its own motion or on petitioner's suggestion afterward to set the verdict aside and grant a new trail."[25]

It has been said that the showing must be of a "constitutional dimension." *United States* v. *Provenzano*, 240 F.Supp. 393, 408 (D.N.J.); *aff'd per curiam* 353 F.2d 1011 (3rd Cir. 1965), *cert. denied*, 384 U.S. 905 (1966). The mere allegation of the existence of a disability, the "mere charge of a wrongdoing . . . without more," *United States* v. *Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), the mere inclusion in the panel of a disqualified juror, *United States* v. *Clark*, 289 U.S. 1, 14 (1933), does not warrant the disclosure of the debates, thoughts and votes of the jury while considering their verdict.[26] Clearly, post-verdict statements of a juror, without more, which reflect certain beliefs, considered by some to be unconventional, neither meet the high standards mandated by the Supreme Court and the Second Circuit; nor justify tearing down the veil of secrecy which properly protects the jury's deliberations.

United States, 146 U.S. 140 (1892); United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971); Ford v. United States, 201 F.2d 300, 301 (5th Cir. 1953).

[25] *Frazier*, 335 U.S. at 513. *See also Clark*, 289 U.S. at 14; *McDonald*, 238 U.S. at 268-269; *Mattox*, 146 U.S. at 149.

[26] Even the "mere opportunity for prejudice or corruption" may not be a sufficient showing. As Mr. Justice Holmes stated in Hold v. United States, 218 U.S. 245, 251 (1910), "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day."

Furthermore, if the jurors were permitted to testify, questions relating to the motives and influences which affected their deliberations would be improper. As Judge Timbers has pointed out

> Few doctrines are more firmly established in our jurisprudence than the proposition that the validity of a verdict may not be attacked, and hence a new trial will not be granted, upon a showing of the mental operations and emotional reactions of jurors in reaching a particular verdict.

United States v. *Reed*, 313 F.Supp. 451, 454 (D. Conn. 1970). This rule, which was adopted by the Supreme Court in *Mattox* v. *United States*, 146 U.S. 140 (1892), has been consistently reaffirmed both by the Supreme Court[27] and the Second Circuit.[28] *Mattox* drew the distinction between prop-

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[27] Stein v. New York, 346 U.S. 156, 178 (1952); Hyde v. United States, 225 U.S. 347, 382-384 (1911); Mattox v. United States, 146 U.S. 140 (1892).

[28] United States v. Miller, 403 F.2d 77, 83-84 n. 11 (2nd Cir. 1968); United States v. Crosby, 294 F.2d 928 (2nd Cir. 1961), *cert. denied sub. nom.* Mittelman v. United States, 368 U.S. 984 (1962); United States v. Grieco, 261 F.2d 414 (2nd Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); Rotondo v. Isthmian Steamship Co., 243 F.2d 581, 583 (2nd Cir.), *cert. denied*, 355 U.S. 834 (1957); United States v. Reed, 313 F.Supp. 451, 454 (D. Conn. 1970), *aff'd* 437 F.2d 57 (2nd Cir. 1971). Other circuits have also continued to follow this rule. *See, e.g.* Armstrong v. United States, 228 F.2d 764, 769 (8th Cir.), *cert. denied*, 351 U.S. 918 (1956); Rakes v. United States, 169 F.2d 739, 745 (4th Cir.) *cert. denied* 335 U.S. 826 (1948); Young v. United States, 163 F.2d 187, 188-190 (10th Cir.), *cert. denied* 332 U.S. 770 (1947). The ABA Project on Minimum Standards for Criminal Justice, approved, in 1968, the following standard relating to impeachment of a verdict.

> Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct,

er and improper testimony: testimony as to *objective* matters ("any facts bearing upon the question of the existence of any extraneous influences") was declared to be proper; however, testimony as to *subjective* matters ("how far that influence operated upon his [the juror's] mind") was deemed to be improper. 146 U.S. at 149.

The refusal of the Second Circuit to deviate from this rule is amply supported by their decisions. In *Rotondo* v. *Isthmian Steamship Co.* 243 F.2d 581 (2d Cir. 1957), a *per curiam* opinion, the court refused to allow a post-verdict examination of the jury, stating

> it is completely well settled that, when objection rests upon the jurors' testimony as to what were the reasons that in fact induced them to find their verdict, the court will not hear them.

243 F.2d at 583 (citations omitted). Moreover, in *United States* v. *Crosby,* 299 F.2d 928 (2d Cir. 1961), *cert. denied sub. nom. Mittelman* v. *United States,* 368 U.S. 984 (1962), the *Mattox* subjective-objective limitation on the scope of inquiry was specifically relied upon in rejecting a request for a post-verdict examination of jurors. In *Crosby,* the defendants claimed that the jury's deliberations were tainted by the use and knowledge of information obtained from news accounts. Citing *Mattox,* the Court of Appeals acknowledged that juror testimony could be received "to prove the fact that they read the newspapers," 294 F.2d at 949, but not to establish the effect of such knowledge upon

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event or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

ABA Project on Minimum Standards for Criminal Justice, Trial by Jury, § 5.7(a) (1968).

their reasoning.[29] Thus, as Judge Friendly declared in *Miller* v. *United States*, 403 F.2d 77 (2d Cir. 1968), "any relaxation of the *Mattox* rule" relating to a post-verdict inquiry into a juror's mental process would be viewed with "apprehension" by this court. 403 F.2d at 84 n. 11.

Continued adherence to these rules is reasonable. To permit a disappointed litigant to distort certain facts, innocent on their face, as a basis for attacking a jury's verdict, would be to open the proverbial Pandora's box. As Judge Smith said in *Crosby*, and Judge Friendly subsequently adopted in *Miller*,

> There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

United States v. *Crosby*, 294 F.2d at 950; *Miller* v. *United States*, 403 F.2d at 82.[30] In addition, to permit a verdict, to be reopened without a sufficient basis in fact, would be

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[29] The Court of Appeals held that the refusal to "examine the jurors as to their mental process" was not error by the district court. 294 F.2d at 950.

[30] In State v. Kociolek, 20 N.J. 92, 118 A.2d. 812 (1955), the Court stated:

> The better reasoned decisions support the exclusion of jurors' testimony as to their mental processes . . . upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore . . . such testimony should not be received to overthrow the verdict to which all assented.

118 A.2d at 816 (citations omitted.)

to seriously impair the integrity of a verdict. And, by diluting the efficacy of a jury's pronouncement, the constitutional guarantee of trial by jury, asserted by defendants, would also be weakened; for the integrity of a jury's verdict is an undeniable cornerstone of this Sixth Amendment right. *Cf. United States ex rel. Daverse* v. *Hohn,* 198 F.2d 934, 938 (3rd Cir. 1950). Therefore, before an assault on a verdict receives judicial approval, the Supreme Court's warning in *McDonald* v. *Pless* should be considered:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

238 U.S. at 267-268.

Considering the instant case, I do not believe that the facts justify the reopening of the jury's verdict. Defendants have not offered any evidence of a separate, unrelated determination of mental incompetency. Nor have they sustained their burden of overcoming the presumption of sanity which protects the juror. The most that can be said of their shallow showing is that it invites a "fishing expedition into a juror's competency." This cannot be countenanced. Moreover, there was nothing in the de-

meanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict.[31] In direct colloquy with

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[31] The jurors were asked the following group questions relating to bias and prejudice:

> Does any juror have any mental reservation as to the acceptance of these principles of law?
>
> And I would assume in response to each and every one of my questions that your silence indicates that you do not.
>
> Do you have any preconceived ideas or prejudices that would prevent or hinder you from following the instructions that the Court will give you in greater detail at a later time and the principles of law which have just recently been outlined for you?
>
> Does any juror have any prejudice or bias for or against any point of view concerning the charges summarized for you from the indictment?
>
> Does any juror know or has any juror or member of his family or any associate had any dealings, either directly or indirectly, with the defendants named in the indictment and presently on trial before you or, for that matter, with any member of their families or friends or associates?
>
> . . . . . .
>
> Has any past experience of a juror in any way whatsoever caused a juror to doubt his ability to sit as a completely impartial and unbiased trier of the facts? Ladies and gentlemen, I have tried in these questions to direct your attention to possible reasons you might not be able to sit as a fair juror. Let me now ask you quite apart from any prior questions, does any juror have the slightest doubt in his mind for any reason whatsover that he would be able to serve conscientiously, fairly and impartially in this case and render a true and just verdict according to the law as it will be explained?
>
> . . . . . .
>
> Let me try it a different way. I am sure you can recognize that even if I sat here until eternity caught up with me and if I had the infinite judgment of our diety I could not pos-

me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors. (I might add that the attorneys and the jurors were always quick to bring matters to my attention which they thought of moment).

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sibly be secure that I have covered every possible question which would root out and bring to the surface any possible prejudice which is important to a consideration of this case. I am not unaware that all of us, without exception, are the subject of various conditioning influences that we acquire in life's work and by virtue of experiences which either bruises us or elevates us, but what you are asked to do as jurors is to sublimate any prejudices or any bias which you may have in determining the facts of the case and to accept the law as given you.

So what I am attempting to find out, and essentially this must rely upon your honesty, your good faith and your willingness to be candid with the Court, what I want to find out is upon an examination of yourselves, can you say that you can sit fairly and impartially in judgment in this case should you ultimately be chosen to serve?

Do you have any doubt whatsoever about your ability to render a fair and impartial verdict upon the facts in evidence and the law to be applied to those facts?

Soul searching is what is necessary at this point because essentially, really regardless of how you answer any questions, the fact of the matter remains that I must appeal to your honesty and your sense of fairness to reveal to the Court any sense or any feeling which might make it difficult or impossible for you to render a fair and impartial verdict.

Transcript of January 4, 1973, at pp. 10, 21-23.

The defendants' second request that the verdicts be set aside even without a hearing is utterly without foundation. A showing which is too weak to permit an inquiry into the jury's deliberations is, *a fortiori*, too weak to warrant a new trial. Also, based upon a comparison of the facts of this case with the facts of those cases in which mental incompetency was alleged by movants and rejected by the courts, it is clear that defendants' showing is too weak to justify setting aside the verdict.

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[32] In all cases in which a juror's incompetency has been alleged as a basis for attacking a verdict, the courts, for differing reasons, have been unanimous in refusing to grant a new trial. Thus, for example, in Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941), within a week after a verdict was rendered, a juror was found to be suffering from a type of insanity "which conjures up an imaginary world and results in a loss of 'contact with reality.'" 19 A.2d at 218. Nevertheless, the trial court refused to grant a new trial because "it was not shown that the juror was so incompetent at trial as not to be able to comprehend 'the nature and quality' of his acts." *Id.* In State v. Welty, 65 Wash. 244, 118 P. 9 (1911), a juror, prior to trial, had been twice adjudged insane and committed to and discharged from an asylum. Five months after trial, the juror was again adjudged insane and committed to an asylum. The trial court denied defendant's motion for a new trial and the Supreme Court of Washington affirmed. In Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939), the juror in question was declared incompetent to manage his own

Accordingly, defendants' motion is denied.

So ordered.

DAVID N. EDELSTEIN,
Chief U.S.D.J.

Dated: New York, New York
July 18, 1973

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affairs "some months" before trial, and remained under the disability throughout the trial. The Supreme Court of Arizona upheld the trial court's rejection of defendant's motion for a new trial, holding that only a declaration of insanity, without the requisite restoration to sanity, would be sufficient to disqualify a juror. Similarly in Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914), the juror in question had been adjudged insane "[s]everal months before the trial" and had been committed to the appropriate state hospital. Although he was released after a "short period" of confinement the juror was never legally restored to sanity. Admitting that the juror was disqualified to serve, the Supreme Court of Arkansas, nevertheless refused to order a new trial. The court reasoned that the disqualification was merely a technical violation of the statute which established qualifications for jurors, and therefore did not warrant a new trial.

See also the cases listed in n. 8, ***supra***.

Appendix 2.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 113-114—September Term, 1973.

(Argued September 13, 1973 Decided January 4, 1974.)

Docket Nos. 73-1759, 73-1769

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN DIOGUARDI AND LOUIS OSTRER,

Defendants-Appellants.

Before:

LUMBARD, FRIENDLY AND FEINBERG,

Circuit Judges.

Appeal from convictions, after a jury verdict, in the District Court for the Southern District, David N. Edelstein, *Chief Judge,* for violations of the federal securities laws (15 U.S.C. §§ 77q(a), 77x, 78j(b) and 78ff), Rule 10b-5 of the Securities and Exchange Commission (17 CFR 240. 10b-5), and federal mail fraud statute (18 U.S.C. §§ 1341), and for conspiracy (18 U.S.C. § 371); and from a denial of new trial motions for alleged incompetency on the part of a juror contrary to 28 U.S.C. § 1865(b)(4).

Affirmed.

HAROLD F. MCGUIRE, JR., Assistant United States Attorney for the Southern District of New York (Paul J. Curran, United States Attorney for the Southern District of New York, S. Andrew Schaffer and John W. Nields, Jr., Assistant United States Attorneys for the Southern District of New York, on the brief), *for Appellee.*

GRETCHEN WHITE OBERMAN, New York, New York (Jay Goldberg, on the brief), *for Appellant Dioguardi.*

SHELDON H. ELSEN, New York, New York (Orans, Elsen & Polstein, Lewis Shapiro, Anthony J. Ferrara and Henry J. Boitel, on the brief), *for Appellant Ostrer.*

LUMBARD, *Circuit Judge*:

John Dioguardi and Louis Ostrer appeal from judgments of conviction entered on April 12, 1973, after a three-week jury trial held in January 1973 in the Southern District, and from the denial by Chief Judge Edelstein of new trial motions. The forty-count indictment was filed May 27, 1971, against the appellants and seven others [1] Count one charged the defendants with conspiring, in violation of 18 U.S.C. § 371 to violate provisions of the federal securities laws and regulations, 15 U.S.C. §§ 77q(a), 77x, 78j(b), and 78ff,

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[1] Of the seven other defendants named in the indictment, three entered guilty pleas (Michael Hellerman, Fred Goodman, and Michael Caricato). Three were tried jointly in a separate trial and were convicted of one or two offenses (Gary Fredericks, Richard Greenberg, and Anthony Soldano), see *United States* v. *Greenberg*, doc. no. 72-2368 (2d Cir.), aff'd from the bench, Feb. 16, 1973. The case of the seventh defendant (Morris Winter) was not tried in view of his cooperation with the government and his guilty plea in a related case. Winter, Hellerman, and Goodman testified for the government, as did Steven Schoengold and Bruce Halpern, both named as co-conspirators.

and Rule 10b-5, 17 CFR 240.10b-5,[2] and the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. The remaining counts charged substantive violations of these same provisions, except 18 U.S.C. § 1343.

On January 26, 1973, the jury found Ostrer guilty on eleven of the seventeen counts submitted to them by the court, and Dioguardi on four of the nineteen counts submitted as to him[3] Prior to sentencing, the defendants moved for a new trial or, in the alternative, for an evidentiary hearing. The basis for this motion was an unsolicited letter from one of the jurors to Dioguardi which allegedly established the incompetency of that juror. In reliance on this, and on the provisions of 28 U.S.C. § 1865

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[2] 15 U.S.C. § 77q(a) codifies section 17(a) of the Securities Act of 1933, prohibiting fraud in the sale of securities. Wilful violation of this section is made criminally punishable by section 24 of the Securities Act of 1933, now 15 U.S.C. § 77x. Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. § 240.10b-5), which prohibits fraud or the use of manipulative devices in both the purchase and sale of securities, was promulgated under 15 U.S.C. § 78j(b), originally section 10(b) of the Securities Exchange Act of 1934. Wilful violation of this rule is made criminally punishable by section 32(a) of the Securities Exchange Act of 1934, now 15 U.S.C. § 78ff.

[3] Both defendants were found guilty on the conspiracy count (18 U.S.C. § 371). Ostrer was found guilty on the following substantive counts:

> 9—Causing a sale confirmation to be placed in the mail in furtherance of a fraudulent scheme for the sale of stock (15 U.S.C. §§ 77q(a), 77x);
>
> 16 through 19—Causing purchase confirmation to be placed in the mail as part of a manipulative device in contravention of Rule 10b-5 (17 C.F.R. § 240.10b-5; 15 U.S.C. §§ 78j(b), 78ff);
>
> 31, 33 through 36—Use of the mails as part of a scheme to defraud (18 U.S.C. § 1341).

Dioguardi was found guilty on only three of the substantive counts: 16, 17, and 31.

(b)(4), they claim that they had been deprived of their right to have their case heard and decided by a panel of twelve competent jurors. Judge Edelstein denied the motion on April 12th. He sentenced Dioguardi to nine years' imprisonment and a $30,000 fine, and Ostrer to three years' imprisonment and a $55,000 fine.[4]

In addition to their objections relating to alleged juror incompetency, the defendants raise four other claims of error in the conduct of the trial: first, that the government prosecutor's argument in summation, to the effect that neither defendant called witnesses to contradict the government's testimony, was improper comment on each appellant's failure to testify in view of the assertion by each that he alone was in a position to contradict the government's witnesses; secondly, that it was error for the trial court to have refused to charge, as requested, that the testimony of admitted perjurers and felons was to be scrutinized with care and caution; thirdly, that it was improper for the trial court to have ruled that Dioguardi's acquittal of another crime could not be proved when the government intended to utilize the acts underlying the acquittal to show a prior course of illegal conduct; finally that consecutive sentences for Dioguardi on two of the counts charging securities law violations, counts 16 and 17, were improper since the underlying facts constituted only a single offense.

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[4] The sentences imposed by Judge Edelstein were as follows: in the case of Dioguardi, a prison term of 5 years and a $10,000 fine on count 1, 2 years and $10,000 on count 16 and similarly on count 17, and 5 years and $1000 on count 31; and in the case of Ostrer, 3 years and a $10,000 fine on count 1, 3 years and a $5000 fine on count 9, 2 years and a $10,000 fine on each of counts 16 through 19, 3 years on each of counts 31 and 33 through 35, and 5 years on count 36. Dioguardi's prison terms are consecutive, Ostrer's concurrent. The sentence imposed on Dioguardi on count 31 was suspended, with five years' probation. The sentence imposed on Ostrer on count 36 was also suspended, with one day's probation.

We find the defendants' arguments unpersuasive and we accordingly affirm the convictions below and let Dioguardi's sentences stand.

I.

The evidence at trial revealed a scheme to manipulate the price of the stock of Belmont Franchising Corporation ("Belmont"), a substantially worthless over-the-counter security. The book value of the stock was almost negligible (Belmont's assets were essentially paper holdings in other concerns); it had been traded for only a short time and for at most a few dollars a share[5]

In January of 1970, Michael Hellerman, who pleaded guilty and testified for the government, began steps to

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[5] Belmont's initial offering of stock to the public was made in the spring of 1969. In an offering circular dated March 21, 1969, and under the statutory exemption from registration for small issues, Belmont offered 100,000 shares out of an authorized 1,000,000, par value 1¢, at an offering price of $3 a share. The circular stated that the offering was speculative and that the price of the shares bore no relation to the book value of the company. In fact, at the time, Belmont's total assets amounted to roughly $10,000 and its liabilities to roughly $7000.

By October 20, 1969, according to the 2A form filed by Belmont with the Securities and Exchange Commission on that date, only 870 shares of the offering had been sold, with 99,130 unsold shares remaining.

On January 2, 1970, in exchange for a total of 195,000 restricted shares of Belmont stock, Belmont acquired 100% holdings in three other concerns: Top Secret International Programming, Slimorama International Corp., and Wonderful World of Grooming. Prior sales of these newly-acquired companies amounted to merely a few thousands of dollars, and net profits for each were about $1000. Nonetheless they listed total assets slightly in excess of $1,000,000. Top Secret International Programming listed a "computer program" value at $500,000, and the other two enterprises each listed "formula rights" valued at $250,000. These assets were reflected in supplementary notes in Belmont's financial statements for the end of 1969, but the underlying statements of the

drive up the price of Belmont stock, first to $5 or $6 a share and then to nearly $50 a share. At that time two stock manipulators, Anthony Soldano and Fred Goodman, in concert with Hellerman, commenced acquiring substantially all of the 28,720 known publicly tradeable shares of Belmont. Goodman and Soldano executed their purchases ostensibly through the open market, using brokers who quoted prices for Belmont through the National Quotation Bureau's pink sheets for over-the-counter securities. These purchases created the appearance of an active public market in the stock.

By early March, 1970 Goodman and Soldano had caused the market price of Belmont as quoted in the pink sheets to reach $15 a share. They did this primarily through directions to their brokers, who traded small quantities of the stock among themselves. In the meantime, Goodman and Soldano had acquired control, they believed, of all the outstanding stock.

At this point Hellerman's role became paramount. According to his testimony, he already had an understanding with Dioguardi that "whatever I did in the future , . . . he would have 25 per cent." It had also been agreed between Hellerman, on one side, and Goodman and Soldano on the other that once the price of Belmont stock reached $15, Hellerman and his associates would purchase all the stock at the $15 level, with a $5 per share kickback, prior to further manipulation upwards. In confirming this arrangement with Goodman and Soldano, Hellerman took Soldano to Dioguardi's office "to make sure it was on the record."

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three subsidiaries, conveniently acquired after the start of the year, were unaudited.

Belmont's second 2A statement, filed with the SEC in April, 1970, indicated that 28,720 shares of the March 21, 1969, offering had been sold, and that no more of the original 100,000 shares were still being offered.

According to Hellerman, it was at this time in early March that he brought Ostrer into the scheme, although the two were only recently acquainted. Ostrer agreed to commit himself to buy 14,000 shares of Belmont at $15 a share ($210,000 total), with the understanding that he would split any future profits with Hellerman, that Hellerman would guarantee him against loss, and that a loan of the purchase money would be arranged so that he would not have to "lay out a quarter" of the $210,000. Purchase orders in Ostrer's name or in his behalf were to be made through various New York Stock Exchange firms.

Ostrer then placed orders in his own name and in his sister's for 14,000 shares of Belmont. However, most Exchange firms which he approached refused to accept his orders, and he was forced to place relatively large block orders through firms where brokers were already in league with Hellerman.[6]

Contemporaneously, Hellerman made arrangements with others to purchase the remaining 14,000 or so shares of Belmont. These individuals were able to pay the selling brokers (at the $15 a share price), but Ostrer was unable to raise the $210,000 needed to "hold up" his end of the deal, a circumstance which left his brokers unpaid. According to Hellerman, he thereupon obtained a loan for Ostrer through Dioguardi. The funds, totalling $60,000, came from Hickey DiLorenzo, at an interest rate of 1½% a week. DiLorenzo also demanded and received $24,000 from Hellerman for this favor (part of the kickback

[6] Among these orders were ones through Bruce & Co. on March 10, 1970, for 2000 shares, and through Kelsey & Co. on March 11, 1970, for 3500 shares. Co-conspirator Bruce Halpern (see fn. 1 *supra*) was a principal of Bruce & Co. Co-conspirator Schoengold was a vice president of Kelsey & Co., and Hellerman was an undisclosed owner of Kelsey.

These particular purchases on March 10th and 11th are relevant to defendant Dioguardi's challenge (discussed further below) to alleged pyramiding of offenses.

profits already made). In addition, Hellerman also advanced Ostrer $52,500, and Ostrer obtained the balance he needed from other sources.

Thereafter, from the end of March through late April, 1970, Hellerman directed purchases and sales of Belmont stock at ever-increasing prices among the individuals and brokers whom he controlled. He kept Dioguardi, Ostrer, and DiLorenzo informed as the price rose. He also arranged for Ostrer to sell off enough stock, through a nominee, to repay the $60,000 loan from DiLorenzo—with a $1700 profit left over which he split with Ostrer. By the end of April he had received approximately $140,000 in kickbacks from Goodman and Soldano. He gave $30,000 to Dioguardi, and invested $9,000 more in a business in which Dioguardi had an interest.

In early May, 1970, the scheme failed. The president of Belmont, through a broker unknown to the manipulators, began to sell heavily his own "investment" stock in the corporation. The market was unable to absorb the sales, and Hellerman was unwilling to buy the stock and could not find other purchasers. Consequently the market for Belmont collapsed, leaving Ostrer (among others) with large quantities of unsold stock. Ostrer then tried to hold Hellerman responsible for his losses. Hellerman became worried because DiLorenzo took Ostrer's side. Dioguardi subsequently arbitrated the dispute to some extent, and arranged for partial compensation to Ostrer to the sum of $25,000.

At trial Dioguardi called no witnesses and based his defense primarily on cross-examination going to the lack of credibility of the government's major witnesses, who were all accomplices. Ostrer did not testify but he did call two witnesses whose testimony indicated that Ostrer had been a "victim" of Hellerman's machinations.

About ten days after trial, Dioguardi received a letter from one of the jurors, Miss Genena Rush, a nurse's aide

employed at Flower Fifth Avenue Hospital in New York City. The letter was written on stationery bearing the zodiac sign of Libra, and on one page the legend that it was "the heavenly house under which I was born." The juror wrote of her clairvoyant powers which enabled her to see that Dioguardi was basically a good person. She stated her belief that he was guilty, "Your mistake your guilty," and questioned him about Hellerman, "Why you let such a relationship exist between you and a man like Hellerman?," and called upon him to repent, "One word appear before me *repent*. If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost." Miss Rush stated that

> I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing.

and that her eyes

> are only partly open . . . . Unfortunate, a curse was put upon them some years ago. I have some people working on them.

The letter is reproduced in full in the margin.[7]

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[7] Miss Rush's letter reads as follows:

521 W 152 Street, New York, N.Y. 10031
February 8th—1973

Dear Mr. Dioguardi,

Under the situation and such circumstance I hope that I have made the right decision. I talk to my friends Bertha and her husband Olive about this, Olive agree that I write to you. Bertha, however, was against it. Nevertheless, I felt I had to write you. I cannot omit what I have seen. When I saw the good within you and how hard your wife was trying; I prayed about it. One word appear before me *repent*. If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost. Before I continue I must explain something to you. I have eyes and

Dioguardi's attorneys sent copies of the letter to seven psychiatrists, all of whom responded (one in an affidavit)

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ears that I can see things before it happen. I can tell you about other and what they are thinking and doing. If I am wrong about this it is the first time.

I would like to visit you. I would like to talk to you about what appear before me. I would like to do so when my eyes fully open. They are only partly open. I don't know at the present when they will open. Unfortunate, a curse was put upon them some years ago. I have some people working on them. Everything is being done that can be done. So we will have to wait. As I stated I cannot omit what appear before me, when I was on the jury bench. You feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, however, I am wrong it is the first time.

Why, you let such a relationship exist between you and a man like Hellerman? When I think of the good that I saw within you it does not add up. Where did Hellerman get those fur coats? Does he have any for sail? Omit the question. I really can't afford one, and if I probably be afraid to wear it.

Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch.

That was a good lawyer you had. I entain to send him some custom as soon as my eyes open.

Tell Ostrer I am praying for him.

Mr. Dioguardi, I want to ask a favor of you please.

I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me.

Let's leave color out, *OK*.

I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free.

When I call the Federal information center and the record room yesterday they all know you. They all seem to have it in for you. Its seated deep within them like a personal matter.

Sincerely,

Genena

to the effect that, in their opinion, what Miss Rush had written indicated hallucinatory tendencies, symptoms of possible psychosis, paranoia, and grandiosity, and in general an inability to appreciate reality without fantasizing.[8] The psychiatrists also pointed out that further psychiatric analysis was needed before a diagnosis could be ventured with any certainty, or before it could be said that Miss Rush's infirmities, whatever their nature and extent, might have rendered her unable to comprehend the proceedings at trial.[9] The psychiatrists were given no information about

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The letter sheets were printed with the word "LIBRA" and a picture of a woman with scales. On the last page of the letter, under the picture, Miss Rush wrote, "The sign Libra is the heavenly house of the zodiac under which I was born." The letter was addressed to "Mr. John Dioguardi, Federal Correction Institution, Dan Bury, Conn. 06813."

[8] The copy of the letter which Dioguardi's attorneys used at first was not the original from Juror Rush. Rather it was a handwritten copy which Dioguardi had made of the original and which he had forwarded to them. Somewhere in transcribing the word "omit" was changed to "admit" in the fifth sentence of the first paragraph and also in the ninth sentence of the second paragraph. Thus "I cannot omit what I have seen . . ." became "I cannot admit what I have seen . . ." and, similarly, "I cannot omit what appear before me . . ." became "I cannot admit what appear before me. . . ." Six of the seven psychiatrists (all except Dr. Portnow) received their copy of the letter in this incorrect form. These errors may have influenced their reading and subsequent analysis of the letter, but we do not think significantly. The defendants' contentions concerning the competency of Miss Rush rest as much on the letter taken as a whole as on any particular sentences. While not belittling its importance, we do not think that reliance on the incorrect word "admit" was, as the government contended, "the cornerstone of [the] various psychiatric opinions."

[9] The supporting letters of the psychiatrists and the affidavit of Dr. Portnow need not be set out at length. Samples of their conclusions are as follows:

1.) Dr. Stanley L. Portnow (affidavit of April 2, 1973):

> [T]he letter makes a positive presumptive showing that . . . the juror suffered from a chronic psychotic thought disorder

the juror or about the trial and the issues, and the court had forbidden anyone to seek to interview her.

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which so severed her relationship with reality that she was unable to exercise critical judgment or to function in an unbiased manner in the evaluation of evidence produced at the trial. Indeed, it would appear that her unsoundness of mind was so overwhelming that she was subject to auditory and visual hallucinations, delusions and a belief in her own omnipotence.

The exact nature of the type of psychosis which the juror is afflicted, can be further investigated. . . . Such an investigation would entail clinical psychiatric interviews and, of particular importance, psychological testing. . . .

2.) Dr. Samuel C. Karlan (letter of March 15, 1973):

It is clear from this letter that this patient is having imaginations about what she can see and what she can do and these are in the form of visual hallucinations and apparently auditory hallucinations. It is also clear from this letter that she had these visions while she was on the jury.

It is therefore my opinion that the letter is evidence that this patient underwent a psychotic episode while she was on the jury and while she wrote this letter, which is suggestive of a schizophrenic mechanism and that she was not in contact with reality.

3.) Dr. Robert W. Damino (letter of March 15, 1973):

The contents of the letter written by Gemena *(sic)* Rush indicate that she is substantially disturbed in reality relationships . . . that she was having visual hallucinations . . . [and] that this woman was making an identification with the accused. . . .

[A]t the time she served on the jury she was utterly incapable of thinking logically as to the evidence, and utterly incapable of properly evaluating the evidence.

4.) Dr. Jerry C. Atkins (letter of March 16, 1973):

My impression is judging from this letter Miss Rush would have had great difficulty exercising sound judgment during the trial mentioned in her letter. Her religious convictions could be classified as being ideas of grandiosity and furthermore there is evidence of auditory and visual halucinations *(sic)* in her description of herself.

5.) Dr. John J. Vetter (letter of March 15, 1973):

[T]here is clear cut evidence of mental disorder. . . . The abnormal thinking processes, impairment of judgment, halluci-

On the basis of Miss Rush's letter and the opinions of the psychiatrists, Dioguardi and Ostrer moved pursuant

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natory experience and delusional belief directly involving the case at hand, would indicate an incapacity, by reason of mental infirmity, to render efficient jury service, or to have functioned efficiently as a juror in the case concerned.

6.) Dr. Arnold H. Zucker (letter of March 5, 1973):

The writer is emotionally involved with Mr. Dioguardi, in an intensive manner.

The writer is concerned with Mr. Dioguardi's welfare and fate.

The writer wishes to be helpful and supportive.

The writer believes she possesses powers of clairvoyance and feels impelled to act upon her revelations.

The writer experiences guilt about Mr. Dioguardi's incarceration. She is convinced about his "bad" behavior (wrongdoing, association with "a man like Hellerman") but "sees" the "good" in him. Her responses are somewhat appropriate in the context of her educational, cultural, and religious background. To alleviate her guilt feelings and "save" Mr. Dioguardi, she urges him to "repent", mend his ways, and maintain his faith. . . .

I believe that the data suggests the following psychodiagnostic impressions, which require clinical confirmation (psychiatric evaluation of the writer).

1. Above the cultural-religious beliefs, *autistic* (pathological fantasy preoccupation) *trends* are indicated . . . .

2. *Paranoid trends* are significant. . . .

. . . . . .

[M]y psychiatric impression is that of a highly paranoid, autistically preoccupied (probably psychotic) individual, who has maintained fairly adequate external controls and functioning, but who may be decompensating due to the strong emotions produced by her role in the trial.

7.) Dr. Donald M. Brough (letter of February 28, 1973):

[T]his letter was written consciously with every good intention on the part of Mrs. (*sic*) Rush in an effort to behelpful to Mr. Dioguardi. However, . . . the writer was here showing evidence of being hallucinated, delusional and would prove to be suffering from a Paranoid Condition.

Taking it in a far less literal fashion, allowing the greatest degree of latitude imterpreting what she wrote, so that it can

to Rule 33, F.R.Crim.P., for a new trial or, in the alternative, for an evidentiary hearing on the competency of Miss Rush as a juror. They asserted that an uncontroverted showing of incompetency had been made out, in violation of 28 U.S.C. § 1865(b)(4) and their constitutional rights.[10]

Judge Edelstein, after hearing oral arguments and receiving briefs, denied the motion for a new trial and for further investigation of the juror's competency on April 12, 1973, and later filed a thorough and considered opinion on July 18, 1973. He stated:

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be taken as a somewhat picturesque, idiosyncratic expression of her ideas, influenced by educational, cultural and religious factors, I still would find important grounds for believing that the letter shows that she was involved in this situation in a very unreal and unusual way.

In my opinion it is most likely that she is, in fact, suffering from a Paranoid Condition in which she has hallucinatory experiences and delusional thinking.

Whatever the court may consider the proper steps to take in regard to any other aspect of the case, it would be my hope that further psychiatric examination would be gently encouraged upon her, and that she would be willing to cooperate.

[10] 28 U.S.C. § 1865, which is part of the Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 53, provides in relevant part as follows:

> (b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries unless he . . .
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

The Act provides no guidelines, however, for what procedures are to be followed where there is, after trial, discovery of possible grounds for juror disqualification. However, see fn. 12, below. See also ABA Standards Relating to Trial by Jury, Parts II, V, and Commentary (Approved Draft 1968).

> Moreover, there was nothing in the demeanor of the juror during *voir dire,* trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire,* the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict. [footnote omitted] In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors.

Examination of the juror on the voir dire had disclosed that she was then employed by Flower Fifth Avenue Hospital as a patient attendant assisting the nurses and had been so employed for four years. In answer to the court's question as to whether any questions or comments applied to her, she stated that in 1944 she was employed by the Navy Department in Cleveland as assistant to the foreman in the cleaning department. Prior to her current hospital employment she was a silk finisher in a cleaning shop in the Bronx.

II.

A—Competency of Juror Rush

It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at

the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist. In our view the juror's letter, and the essentially horseback uninformed opinions of the psychiatrists regarding the letter, fall considerably short of justifying any further inquiry. Furthermore, the appellants have not cited a single authority which supports a grant of their motion on this record. Judge Edelstein was entirely correct in denying the motion.

Reluctance to inquire into the state of mind of any juror and into the conduct of the jurors during their deliberations rests on sound reason.[11] The rule against any inquiry whatever recognizes exceptions only where there is clear and incontrovertible evidence of incompetence shortly before or after jury service, clear evidence of some criminal act, or evidence of some "objective fact" of internal impropriety.[12] Even in the case of recent incompetence a hear-

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[11] See 8 Wigmore, Evidence §§ 2349, 2352-2354 (McNaughton rev., 1961). As the Supreme Court said in *Stein* v. *New York*, 346 U.S. 156, 178 (1953):

> Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U.S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U.S. 347. "If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, [238 U.S. 264 (1915)] at 267-268.

[12] See 18 U.S.C. §§ 245(b), 1503, 1504. See also 28 U.S.C. § 1867(f). Such exceptions as these which the law has condoned to the privacy and sanctity of the jury reflect the need to preserve

ing will be had to establish that it must have existed during jury service.

The strong policy against any post-verdict inquiry into a juror's state of mind was stated by this court regarding an analogous situation in *United States* v. *Crosby*, 294 F.2d 928, 950 (1961), cert. denied sub nom. *Mittelman* v. *United States*, 368 U.S. 984 (1962):

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its impartiality. The quickness with which jury findings will be set aside when there is proof of tampering or *external* influence, and the severe penalties imposed on those attempt such interference, parallel the reluctance of courts to inquire into jury deliberations when a verdict is valid on its face. See *Mattox* v. *United States*, 146 U.S. 140, 149-50 (1892). Such exceptions support rather than undermine the rationale of the rule that possible *internal* abnormalities in a jury will not be inquired into except "in the gravest and most important cases." *McDonald* v. *Pless*, 238 U.S. 264, 269 (1915).

These considerations explain the one exception to the rule against a jury impeaching its own verdict allowed in those instances when the evidence offered of internal impropriety concerns "objective facts." This "distinction between what may and what may not be established by the testimony of jurors to set aside a verdict" has been recognized by the Supreme Court. See *Mattox* v. *United States*, *supra*, at 148-149. However, courts have invoked the exception and permitted inquiry into a jury's deliberation only when there has been a strong showing of "objective" impropriety, such as blood relation between juror and defendant or extraneous material brought to the jurors attention during deliberations. As the Supreme Court said in *United States* v. *Reid*, 53 U.S. 360, 366 (1851), "[C]ases might arise in which it would be impossible to refuse [evidence of impropriety] without violating the plainest principles of justice." But "[u]nquestionably such evidence ought always to be received with great caution." Nor has the Court seen fit since then to relax its position, *McDonald* v. *Pless*, *supra*, at 269. See *Rotondo* v. *Isthmian Steamship Co.*, 243 F.2d 581, 583 (2d Cir. 1957); *United States* v. *Crosby*, 294 F.2d 928, 949-950 (2d Cir. 1961), *cert. den. sub nom. Mittelman* v. *United States*, 368 U.S. 984 (1962); 8 Wigmore, Evidence § 2349 (McNaughton rev., 1961). See also ABA Standards Relating to Trial by Jury, Sec. 5.7; *United States* v. *ex rel. Owen* v. *McMann*, 435 F.2d 812 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); and Judge Friendly's discussion in *Miller* v. *United States*, 403 F.2d 77 (2d Cir. 1968), fn. 11, at 83-84.

> There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

We cited this language in *Miller* v. *United States*, 403 F.2d 77 (1968) where the court also emphasized, at page 82, the importance of the dangers presented by inquiries that go beyond objective facts: "inhibition of jury room deliberations, harassment of jurors, and increased incidence of jury tampering." See also *Stein* v. *New York*, 346 U.S. 156, 178 (1953); *McDonald* v. *Pless*, 238 U.S. 264, 268 (1915); and *Mattox* v. *United States*, 146 U.S. 140, 147-151 (1892).

With respect to post-verdict evidence of possible juror incompetency during the trial, courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service.[13] Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency,[14] have courts conducted

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[13] See *Anderson* v. *State*, 54 Ariz. 387, 96 P.2d 281 (1939); *Grand Lodge A.O.U.W. of Ark.* v. *Wood*, 113 Ark. 502, 168 S.W. 1070 (1914); *Austin* v. *People*, 106 Colo. 506, 107 P.2d 798 (1940); *Brown* v. *State*, 219 Ark. 647, 243 S.W. 2d 938 (1951); *Ex parte Lovelady*, 207 S.W. 2d 396 (Tex. Crim., 1947), *cert. granted*, 333 U.S. 867, *cert. dism.*, 333 U.S. 897 (1948); *Douthitt* v. *State*, 182 Tenn. 577, 188 S.W. 2d 555 (1945); *State* v. *Buey*, 104 Mont. 416, 66 P.2d 1049 (1937); *Eastman Kodak Stores, Inc.* v. *Summers*, 377 S.W. 2d 476 (Kan. C.C.A. 1964).

[14] See *Jordan* v. *Massachusetts*, 225 U.S. 167 (1912), aff'g. *Commonwealth* v. *Jordan*, 207 Mass. 259, 93 N.E. 809 (1911); *State* v. *Camp*, 110 W.Va. 444, 158 S.E. 664 (1931); *Burik* v. *Dundee*

hearings to determine whether the disability in fact affected the juror at the time of trial.

But absent such substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party. In *Peterman* v. *Indian Motorcycle Co.*, 216 F.2d 289 (1st Cir. 1954), the plaintiff, shortly after judgment against him in a civil suit for personal injury, moved for a new trial on the grounds "that certain information, discovered since the trial, disclosed the mental unfitness of the foreman of the jury, whose condition, if it had been known . . ., would have been a ground for disqualification." Judge Wyzanski heard counsel on the motion and requested an offer of proof from the plaintiff's attorney.

> The offer of proof was . . . that the juror in question, because of his mental disturbance, has been receiving disability compensation from the Veterans Bureau; that he has difficulty in sleeping and concentrating; that his memory is not good; that he has had depressed periods during which he entertained the idea of suicide; that he has had to undergo treatment for anxiety reaction to a psychic episode expressed by auditory hallucinations; that he has been under the care of a psychiatrist for an extended period, with little prospect of an early overcoming of his difficulties. [*Id.*, at 293.]

Judge Wyzanski held that the offer of proof was inadequate and denied the plaintiff's motion.[15] The Court of Appeals for the First Circuit agreed, stating that:

Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); *Iverson* v. *Prudential Ins. Co. of Amer.*, 126 N.J.L. 280, 19 A.2d 214 (1941); *State* v. *Welty*, 65 Wash. 244, 118 P. 9 (1911).

[15] It is not clear to what extent Judge Wyzanski treated the plaintiff's motion for a new trial in *Peterman* as also being a mo-

> Considering the strong policy against the too-ready impeachment of jury verdicts on the basis of such after-thoughts suggested by a disappointed litigant, . . . the trial judge cannot be held to have abused his discretion in declining to grant a new trial on this ground. [*Id.*]

See also *United States ex rel. Daverse* v. *Hohn,* 198 F.2d 934 (3rd Cir. 1952).

In light of this legal background, we do not believe appellants made enough of a case to justify further inquiry into the competence of Juror Rush. No evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication of insanity or incompetence. Indeed, what we do know of her past, although it is little, reflects quite the contrary situation. She has held steady employment over the past four years as a nurse's aide at Flower Fifth Avenue Hospital, and apparently had steady employment before that as well. The trial judge, as noted above, found the juror alert and responsive and he noted nothing unusual about her during the three weeks of trial and three days and nights of deliberation. Although the opinions of experts are not to be dismissed altogether, they were here of necessity formed in a vacuum, based on one piece of evidence, and fall far short of constituting the sort of "objective fact" which can justify inquiry into the internal workings of the jury. The fact that there is no evidence of harassment of Miss Rush or solicitation of the letter does not render irrelevant the policy considerations which forbid inquiry into the internal workings of the jury absent objective evidence of impropriety. In another case a letter could be fabricated or solicitation could be disguised; a decision for appellants on

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tion for conducting a hearing into the juror's competency. But evidently no hearing was thought required and none was held.

this issue would therefore raise very real risks of "inhibition of jury room deliberations, harassment of jurors, and increased incidence of jury 'tampering.'" Indeed, even where such a letter is as fully voluntary as the one in this case appears to be, it surely was not thought by its author to be an invitation to "develop evidence by investigating the juror's background or by persuading her to undergo a voluntary mental examination"—the suggestions of the dissent for possible proceedings on remand. We conclude that the action of the district court in denying the defendants' motion was entirely proper.

B—Prosecutor's Comments in Summation

The government prosecutor, in his summation, noted that, apart from the two quasi-character witnesses called by defendant Ostrer, the defendants had called no witnesses to contradict the factual content of the government's case. Defense counsel objected to these remarks, and the appellants argue that the remarks were improper in that only they themselves (or co-conspirators whose testimony they could not compel) could have testified in contradiction to the government's witnesses. We do not agree.

It is true that it has been frequently held impermissible for the prosecution to comment on a defendant's failure to call witnesses where only the defendant could offer counter-testimony or where the jury will "naturally and necessarily" interpret this as a comment upon the defendant's silence, otherwise constitutionally protected. See, e.g., *United States* v. *Lipton*, 467 F.2d 1161 (2d Cir. 1972); *United States* v. *Flannery*, 451 F.2d 880 (1st Cir. 1971); *United States* v. *Handman*, 447 F.2d 853 (7th Cir. 1971); *Desmond* v. *United States*, 345 F.2d 225 (1st Cir. 1965).

However, this danger can be neutralized by a prompt corrective instruction to the jury. Such an instruction was given by Judge Edelstein. Moreover, this was not the close situation in which it was a question of a defendant's word against the word of one other (cf. *Handman*, where the defendant was implicated solely by an informer's testimony about a telephone conversation between himself and the defendant). Thus, even though many of the meetings between Hellerman, Ostrer, Dioguardi, and DiLorenzo were private, their activities also involved numerous stock brokers and other Wall Street figures, several of whom also testified at trial. See fn. 1, *supra*. Given the breadth of the operation, it was not improper for mention to have been made of the dearth of defense witnesses from so large a cast of characters. The record supports the conclusion that there were meetings between the persons involved in the Belmont stock manipulation at which more were present than the defendants and the government's witnesses at trial, and that some of these persons could have been called to testify or at least that in many other ways defendants could have waged factual war with the detailed evidence of the government's witnesses.

In *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970) which concerned similar comments by the prosecutor on the strength of the government's case against the accused and on the lack of any contradictory evidence, we reviewed the many precedents which, in almost every instance, have "held that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony," *id.*, at 1269, and then concluded that

> where the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them. [Id., at 1270.]

The defendants' objections to the prosecutor's comments in summation were properly denied.

C—Specific Charge on Accomplice Testimony

Both defendants argue that it was error for the trial court to have refused to instruct the jury specifically that the testimony of accomplices who were confessed perjurers or convicted felons was to be scrutinized with particular care. There is no merit to this argument. The trial court's charge to the jury was amply cautionary on this point. A similar charge was recently sustained by us in *United States* v. *Projansky*, 465 F.2d 123, 136-137 and nn. 24-25 (2d Cir.), cert. denied, 409 U.S. 1006 (1972).

D—The Evidentiary Ruling

At one point in the trial Hellerman testified that Dioguardi had used some of the proceeds of the Belmont stock scheme to help pay off a mortgage on his summer home. Apparently this statement was incorrect. To help pay off the mortgage Dioguardi had used funds obtained through a prior stock manipulation, but one on which he had been acquitted at a previous trial. At the side bar, counsel for Dioguardi argued that the prosecution should correct Hellerman's testimony. The trial court stated that correction was properly the responsibility of defense coun-

sel. Dioguardi's lawyer, however, was unwilling to raise the issue unless proof could also be introduced of the earlier acquittal. The trial judge at this point expressed himself somewhat ambiguously, and the parties differ whether we should read him as having refused to give a ruling in advance on the question whether he would allow proof of acquittal, holding that admissibility would depend on the course of testimony, or as having held that proof of acquittal would not in any case be admissible in this context. In either event, as a consequence of the trial judge's action, Hellerman's testimony was allowed to stand, and the issue was not raised again.

Dioguardi claims that the court's ruling or failure to rule was improper and that it permitted false testimony to reach the jury. This claim, while perhaps technically valid, is essentially groundless. The circumstances behind the controversy at issue were never pursued in testimony in open court. No facts behind it were ever in evidence. While the record does reveal occasional allusions to the prior stock manipulation, the so-called "Imperial deal," none of these could be considered prejudicial in reference to Dioguardi. Hellerman's statement was *de minimis* in view of the other evidence. No reversible error was committed by the trial court under the circumstances. It was a matter fully within the trial court's discretion. See *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

E—Consecutive Sentences for Stock Fraud

Lastly, Dioguardi claims that it was improper for the trial court to impose separate consecutive sentences and separate fines upon him for the violations in counts 16 and 17 of the indictment. Count 16 involved confirmation of the purchase in Ostrer's name, with Dioguardi's ap-

proval, of 2000 shares of Belmont stock through Bruce & Co. on March 10, 1970. Count 17 involved confirmation of the similar purchase of 3500 shares through Kelsey & Co. on March 11th. See fn. 6, *supra*. Dioguardi argues that these purchases, and their confirmations, were part of a single transaction, namely Ostrer's purchasing half (14,000) of the supposed outstanding shares of Belmont stock, and that hence they cannot constitute separate violations of the securities laws.

It is true that there has been debate in the past over whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud. See 3 Loss, Securities Regulation 1521 (2d ed., 1961); and also *United States* v. *Hughes*, 195 F.Supp. 795 (S.D.N.Y. 1961). However, recent litigation involving fraud under the securities laws has resolved this debate in favor of the position that each transaction in a securities fraud case constitutes a separate offense. *United States* v. *Sanders*, 415 F.2d 621 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970); see also *United States* v. *Binstock*, 37 F.R.D. 13 (S.D.N.Y. 1965). This position acknowledges the fact that activity such as the kind Dioguardi engaged in here in relation to the two Ostrer purchases on March 10th and 11th was fraudulent in each instance, not necessarily in respect to the scheme as a whole, nor even necessarily in respect to the sellers on those two days (who may have been co-conspirators or perhaps simply others pleased to sell at a gain), but in respect to the investing public. Thus although a situation can be envisioned in which consecutive sentences on multiple fraud convictions would be questionable, *cf. United States* v. *Brown*, 36 F.R.D. 207 (D.D.C. 1964), in the instant case the determination and sequence of the sentences imposed on defendant Dioguardi were

matters within the discretion of the trial court. See *Sanders v. United States*, *supra*, at 626, and the cases there cited. The consecutive sentences on counts 16 and 17 were therefore proper.

Judgments of conviction affirmed.

FEINBERG, *Circuit Judge* (dissenting):

The majority opinion holds that an unsolicited, bizarre letter from a juror, who claims to be able to "see things before it happen" and to know what other people "are thinking," does not justify further inquiry into the juror's competence, even though seven psychiatrists preliminarily diagnose her as mentally ill. From this holding, I emphatically dissent.

There is no need to rehearse in great detail the basic principles of law that govern the issue before us. As the majority points out, after a trial is over, there is a great judicial "[r]eluctance to inquire into the state of mind of any juror[s] . . . during their deliberations," and that reluctance rests upon "sound reasons." But reluctance to inquire is not the same as obdurate refusal to face facts, especially such "objective" facts as a rambling, unsolicited letter, sent 13 days after verdict, that strongly suggests severe mental illness. A close look at that letter and the comments upon it of the seven doctors, whose six letters and one affidavit were submitted to the district judge, is instructive.

The letter from juror Rush was written on stationery which bears the Zodiac sign "Libra" at the top over a picture of a woman holding scales. It stated as follows:

February 8th—1973

Dear Mr. Dioguardi,

Under the situation and such circumstance I hope that I have made the right decision. I talk to my

friends Bertha and her husband Olive about this. Olive agree that I write to you. Bertha, however, was against it. Nevertheless, I felt I had to write you I cannot omit what I have seen. When I saw the good within you and how hard your wife was trying; I prayed about it. One word appear before me *repent*. If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost. Before I continue I must explain something to you. I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing. If I am wrong about this it is the first time.

I would like to visit you. I would like to do so when my eyes fully open. I would like to talk to you about what appear before me. They are only partly open. I don" know at the present when they will open. Unfortunate, a curse was put upon them some years ago. I have some people working on them. Everything is being done that can be done. So we will have to wait. As I stated I cannot omit what appear before me, when I was on the jury bench. You feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, however, I am wrong it is the first time.

Why, you let such a relationship exist between you and a man like Hellerman? When I think of the good that I saw within you it does not add up. Where did Hellerman get those fur coats? Does he have any for sail? Omit the question. I really can't afford one, and if I could I probably be afraid to wear it.

Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her

through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch.

That was a good lawyer you had. I entain to send him some custom as soon as my eyes open.

Tell Ostrer I am praying for him.

Mr. Dioguardi, I want to ask a favor of you please.

I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me.

Let's leave color out, *OK.*

I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free.

When I call the Federal information center and the record room yesterday they all know you. They all seem to have it in for you. Its seated deep within them like a personal matter.

Sincerely,

Genena

Thus, the juror claims that she has "eyes and ears that . . . can see things before it happen." She can "tell" what other people "are thinking and doing." Her eyes are now "only partly open" because "a curse was put upon them some years ago." She is writing this letter because "[s]omething appear before me that I must do." Although Dioguardi's wife was never in the courtroom, the juror somehow knows that Mrs. Dioguardi "is a brave girl" and "is still in business," but is being watched. As soon as the juror's "eyes open" she intends to send Dioguardi's lawyer some customers. And when she "saw the

good within" Dioguardi and how hard his wife "was trying," the word "*repent*" appeared before her.

The letter is staggering in its implications. No special training is needed to appreciate that this juror seems to believe she is clairvoyant and can see things that may not, or could not, be apparent to others, such as what people think or an event before it happens. And if juror Rush actually did believe she was clairvoyant in this way, is it really necessary to spell out why she could not fairly try the guilt or innocence of any man? It seems obvious to me that a "clairvoyant" juror might honestly "see" a defendant's guilt despite the lack of evidence because she can see into the defendant's mind. Or conversely, she might for the same reason divine a defendant's innocence, in the face of overwhelming proof of guilt. A person who was known to regard herself as clairvoyant would certainly not be allowed on a jury in the first place. *United States* v. *Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); *United States* v. *Benson*, 31 Fed. 896, 900 (D. Cal. 1887). Such a women clearly be "incapable, by reason of mental...infirmity, to render satisfactory jury service . . ." under 28 U.S.C. § 1865(b)(4). Cf. *Jorgensen* v. *York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947). Moreover, the incapacity on such a ground of even one juror would poison the verdict regardless of the competence of the remaining 11. *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966) (per curiam); *United States* v. *Rattenni*, 480 F.2d 195, 198 (2d Cir. 1973).

The ultimate question, of course, is whether juror Rush was in fact "incapable" of rendering satisfactory jury service, but the precise legal issue before us is whether enough was presented to the district judge to require holding a hearing to determine her capacity to serve. The district court had before it the juror's letter and the views of seven

reputable psychiatrists, all of whom rendered expert opinions that the writer of the letter suffered from severe mental illness.[1] According to some of these doctors, the precise diagnosis of her problem would require clinical evaluation through interviews and tests, but all of the psychiatrists agreed on the existence of a seriously disabling thought disorder which in their opinion would have impaired her mental functioning during the trial and her ability to judge the case intelligently. These expert views stand uncontradicted on the record before us. True, the majority opinion refers to them as "essentially horseback uninformed." However, in view of the district judge's oral order, not mentioned in the majority opinion, that no one was to contact the juror,[2] these adjectives are simply not justified. Several of the psychiatrists made clear that they would like to know more about the juror. Obviously, the directive prevented defense counsel from attempting any interview, and both defense and government counsel apparently interpreted the order as inhibiting any investigation of the juror, even apart from talking to her.

The combined effect of the uncontradicted record and the apparently intended scope of the judge's order requires a remand for a further hearing. The unsolicited letter is bizarre, and seven psychiatrists have given their opinion on the basis of it that the juror was seriously mentally ill during the trial. I do not see how the district court, or we, can disregard these facts. Certainly a defendant is entitled to 12 sane jurors, *Parker* v. *Gladden*, *supra*,

[1] The credentials of the seven psychiatrists were set forth in varying detail, but, on this record, all appear to be qualified to give an expert opinion.

[2] The judge stated in open court that juror Rush

> is not to be contacted by anybody or communicated with by anybody in any possible way, directly or indirectly. Is that clear, gentlemen?

385 U.S. at 366; *United States* v. *Rattenni, supra*, 480 F.2d at 198, and if one is incompetent, we should exercise our supervisory power to order a hearing or a new trial just as we would if one turned out to be blind or deaf although no one had noticed it. Possibly this juror is not incompetent; she may just be peculiar. But the record as it now stands cannot justify such a conclusion. It may be that after the record is amplified—at least by cross-examination of appellants' witnesses and by testimony of government experts—the district court might be warranted in finding juror Rush to have been capable of jury service. I express no view as to that. However, at the very least, defendants are entitled to a full hearing on the issue of the juror's competence.

The majority cites a good deal of authority for the proposition that unless there is "substantial if not wholly conclusive evidence" of a juror's incompetence during trial, a post-trial inquiry will not be ordered "merely on the allegations and opinions of a losing party." See, e.g., *Peterman* v. *Indian Motorcycle Co.*, 216 F.2d 289 (1st Cir. 1954). I do not quarrel with this statement of the law. Indeed, I heartily endorse it since the evidence on this record of the mental incompetence of juror Rush is, as I have indicated, quite "substantial." Moreover, the inquiry here was not triggered solely by "the allegations and opinions of a losing party," but by the unsolicited letter of the juror herself, which was sent only 13 days after the verdict and is itself persuasive evidence of incapacity.[3] None of the decisions cited by the majority involved such an unusual objective fact. In *Peterman, supra*, for example, there was no communication by the juror, which was itself an overt symp-

[3] There is no hint in the record that the letter was actually solicited or not genuine. Upon remand, those questions could, of course, be explored.

tom of mental disorder. On the contrary, there was "no suggestion that the juror was insane," 216 F.2d at 293, whereas here the uncontradicted record supports the opposite conclusion. Furthermore, in many cases of alleged juror taint, hearings were actually held or ordered upon remand. See, e.g., *Remmer v. United States*, 347 U.S. 227 (1954); *United States* v. *Hand*, 472 F.2d 162 (5th Cir. 1973) (per curiam); *United States* v. *Silverman*, supra; *United States ex rel. Owen* v. *McMann*, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971). Cf. *Smith* v. *Cox*, 435 F.2d 453 (4th Cir. 1970), vacated on other grounds sub nom. *Slayton* v. *Smith*, 404 U.S. 53 (1971).

I would only add the observation that, far from loosing a Pandora's box of challenges to jury verdicts (as the district court feared), a remand for a hearing here would have almost no precedential value because of the uniqueness of the facts. Nor would a hearing under these circumstances raise the twin spectres of juror harassment or incursion on jurors' privacy during their deliberations. Cf. *Miller* v. *United States*, 403 F.2d 77, 82 (2d Cir. 1968). The letter which forms the basis of the present attacks on the verdict below was, as I have stressed, unasked for, and not the product of a fishing expedition. Moreover, an inquiry into competence need not entail a probe of jury discussions. I have already mentioned such alternative possibilities of enlarging the record as cross-examination of appellants' witnesses and testimony by government experts. Counsel may also develop evidence by investigating the juror's background or by persuading her to undergo a voluntary mental examination. I see no need to explore every conceivable avenue of investigation, but merely wish to make the point that I am not counseling any general break with the wise policy of protecting the sanctity of the jury room and the privacy of individual jurors.

For these reasons, I strongly believe that the district court erred in refusing to make further inquiry into the competence of juror Rush. Therefore, I dissent from the affirmance of the order denying a new trial without a hearing.[4]

[4] I agree with the majority's disposition of the other points raised by appellants.

Appendix 3.

PRE-TRIAL VOIR DIRE OF VENIRE.

[A-1177]

THE CLERK: Juror No. 8 is now Geneva Rush. Is it Miss or Mrs.?

P. J. No. 8: Miss.

THE COURT: Are you employed, Miss Rush?

P. J. No. 8: Yes, I am. I work for Flower Fifth Avenue Hospital and I am a patient attendant and I assist the nurse with her work in giving medication.

THE COURT: How long have you been so employed?

P. J. No. 8: A full year.

THE COURT: Have you heard my questions and comments?

P. J. No. 8: Yes, I did.

THE COURT: Did you understand them?

P. J. No. 8: Yes, I did.

THE COURT: Do any of those apply to you?

P. J. No. 8: One does. Back in 1944 I was employed for the Navy Department and this was in Cleveland, Ohio.

THE COURT: What kind of work did you do for them?

P. J. No. 8: I was assigned in the cleaning department.

[A-1178]

THE COURT: In what?

P. J. No. 8: The cleaning department. And I was an assistant to the foreman in helping seeing that the was cleaned.

THE COURT: How long have you been employe Flower Fifth Avenue?

P. J. No. 8: Four years.

THE COURT: What did you do before that?

P. J. No. 8: I was a silk finisher in a cleaning sho in the Bronx.

THE COURT: Where do you live?

P. J. No. 8: 521 West 152nd Street.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1621

JOHN DIOGUARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1631

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) [1] is reported at 492 F. 2d 70.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1974. Upon timely application, Mr. Justice

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[1] "Pet. App." refers to the appendix in No. 73-1621. The three volumes that were designated "Appellants' Appendix" in the court of appeals are referred to as "App."

Marshall extended the time for filing a petition for a writ of certiorari to April 30, 1974. The petitions for writs of certiorari were filed on April 27, 1974 (No. 73-1621) and April 30, 1974 (No. 73-1631). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a post-trial letter from a juror urging petitioner Dioguardi to repent and claiming, *inter alia*, that the writer possessed clairvoyant powers is sufficient to justify an inquiry into that juror's mental competence at trial.

2. Whether in the circumstances of this case the government's summation comment on the failure of the defense to produce witnesses to contradict the factual content of its case constituted a comment on the petitioners' failure to testify on their own behalf.

3. Whether in the circumstances of this case two different unlawful stock purchases could provide a basis for two separate counts in the indictment and separate and consecutive penalties.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York,[2] petitioners were convicted on a multi-count indictment charging violations of

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[2]Of the seven other defendants named in the indictment, three pleaded guilty, three were tried jointly at a separate trial, and one pleaded guilty in a related case. See *United States* v. *Greenberg*, No. 72-2368 (C.A. 2), affirmed from the bench, February 16, 1973.

federal securities laws (15 U.S.C. 77q(a), 77x, 78j(b) and 78ff), Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. 240.10b-5),[3] the federal wire and mail fraud statutes (18 U.S.C. 1341 and 1343) and the federal conspiracy statute (18 U.S.C. 371). Petitioner Ostrer was convicted on eleven counts of the indictment; he was sentenced to ten concurrent terms of imprisonment ranging from two to three years, and fined $55,000.[4] Petitioner Dioguardi was convicted on four counts of the indictment; he was sentenced on two counts to terms of five years' imprisonment, one of which was suspended, and sentenced on two other counts to terms of two years imprisonment. The sentences were to run consecutively. He was also fined $30,000.

The facts of this case were thoroughly discussed in the opinion of the court of appeals. Briefly, they show a scheme to manipulate the price of the stock of Belmont Franchising Corporation upward from five to fifty dollars per share during a five month period in 1970.

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[3] Under the Securities Act of 1933, 15 U.S.C. 77a, 77aa, section 77q(a) prohibits fraud in the sales of securities. Violations of this section are punishable under Section 77x. Rule 10b-5, promulgated under 15 U.S.C. 78j(b), Securities Exchange Act of 1934, prohibits fraud in the purchase and sale of securities. Violations of this rule are punishable under 15 U.S.C. 78ff.

[4] On count 36, Ostrer was sentenced to five years' imprisonment. The sentence was suspended and he was placed on probation for one day.

In January of 1970, Anthony Soldano and Fred Goodman, acting in concert with Michael Hellerman,[5] began to acquire substantially all of the publicly tradeable shares of Belmont in the hope of creating the appearance of an active public market in the stock at approximately five dollars per share. Hellerman promised Soldano and Goodman that he and his associates would purchase the stock from them once they had succeeded in acquiring all of the Belmont stock and raising the price of a share to fifteen dollars. Hellerman planned a further upward manipulation of the stock from fifteen dollars.

In furtherance of the stock manipulation scheme, petitioner Ostrer agreed to place purchase orders for Belmont stock. In turn, he expected to reap large profits after brokers were paid off to sell the shares at much higher prices to their customers. The market collapsed, however, before these expectations could be realized.

Petitioner Dioguardi arranged for Ostrer to obtain a loan with which to purchase a number of shares. Hellerman and Dioguardi had an agreement whereby Dioguardi would receive twenty per cent of whatever Hellerman made from this scheme. On one occasion, Dioguardi was given $30,000 by Hellerman.

At trial, Dioguardi called no witnesses but sought on cross-examination to impeach the credibility of the government's chief witnesses, who were petitioners' accomplices. Ostrer did not testify but called two witnesses whose testimony indicated that Ostrer had been victimized by Hellerman (Pet. App. 7a-11a).

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[5] Hellerman later pleaded guilty and testified for the government.

About ten days after the trial, Dioguardi received a letter from one of the jurors, Miss Genena Rush, urging him to repent. The letter contained, *inter alia*, references to clairvoyance and astrology (Pet. App. 11a, n.7).

ARGUMENT

1. Petitioners contend that the trial court erred in denying their request for an inquiry into the mental competence of a juror who wrote petitioner Dioguardi a letter after trial urging him to repent and stating, *inter alia*, that she possessed clairvoyant powers. They claim that their right under 28 U.S.C. 1865(b)(4) to a jury of persons not "* * * incapable, by reason of mental * * * infirmity, to render satisfactory jury service" was thus violated. The court of appeals correctly rejected this contention. As it observed (Pet. App. 17a):

> It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist.[6]

The purpose of this rule is to protect jurors from harassment, to preserve the sanctity of the jury room, and to prevent jury tampering, uncertain verdicts, and a flood of frivolous petitions. See *Stein* v. *New York*, 346 U.S. 156, 178; *McDonald* v. *Pless*, 238 U.S. 264, 268; *Miller* v. *United States*, 403 F. 2d 77, 82 (C.A. 2).

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[6]Judge Feinberg, dissenting, "heartily endorse[d]" the majority's position that there must be "substantial if not wholly conclusive evidence" of a juror's incompetence during trial before a post-verdict inquiry is ordered (Pet. App. 32a). He took issue only with the majority's conclusion that such evidence did not exist in this case.

Because it is significantly more intrusive and less likely to turn on objective evidence than other sorts of jury probes, a competency inquiry offers unprecedented opportunities to harass, humiliate, and intimidate individual jurors.[7] Consequently, as the court of appeals noted (Pet. App. 19a-20a):

> * * * [c]ourts have refused to set aside a verdict, or even to make further inquiry, unless there [has been] * * * proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial. [Footnotes omitted.]

Although no evidence of an insanity adjudication was adduced, the court of appeals did not rest its decision upon this standard, as petitioners claim.[8] Instead, the court chose to stress the heavy burden of proof attending a request for an inquiry and concluded that "[n]o evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication of insanity or incompetence" (Pet. App. 21a).

[8]Petitioner Ostrer erroneously asserts that the decision of the court of appeals was "premised on the assumption that the mental infirmity disqualification of 28 U.S.C. §1865 applied only to mentally

7/ For this reason, petitioners' contention that an incompetency hearing is analogous to an inquiry into allegations of juror bias or "extra facts" in the jury room is misleading. Such inquiries do not seriously threaten the privacy of a juror or the integrity of the deliberative process, and the underlying facts can usually be swiftly and accurately determined. See Parker v. Gladden, 385 U.S. 363; United States ex rel. Daverse v. Mohn, 193 F. 2d 934 (C.A. 3).

In support of their request for a competency hearing, petitioners rely almost entirely[9] on a post-trial letter allegedly written by the juror to petitioner Dioguardi and the analyses of that letter by seven different psychiatrists. The analyses were based, however, on an erroneous version of the letter. The copies provided by defense counsel stated " * * * I cannot *admit* what appear before me when I was on the jury bench," instead of correctly stating " * * * I cannot *omit* what appear before me when I was on the jury bench" (Pet. App. 11a, n. 7, see also n. 8; emphasis added). The mistranscription was crucial, since the mistake constituted the only concrete evidence in the letter that the juror had hallucinated at trial. Five of the seven psychiatrists consulted expressly relied on this error as evidence of hallucinations during trial, as well as

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ill persons who have been formally adjudicated as 'insane' or 'incompetent' and that a convicted defendant may not obtain a new trial if he discovers shortly after the verdict that one (or presumably several) of his jurors were mentally ill, so long as they were never formally adjudicated as insane" (Pet. No. 73-1631, p. 14). Petitioner Dioguardi further misreads the opinion below by claiming: "The opinion holds that no showing of mental infirmity, except proof of a *contemporaneous* adjudication of mental incompetence, ever warrants inquiry into whether a juror was mentally unqualified during trial * * * " (emphasis added) (Pet. No. 73-1621, p. 10).

[9]The only other suggestion of mental incompetence adduced by petitioners is the contention, raised for the first time in this Court, that when the juror in question stated on voir dire that she was a "patient attendant" at Flower Fifth Avenue Hospital, she did not mean a "nurse's aide" but a mental patient who worked part-time attending other patients. There is no evidence to support a conclusion that Flower Fifth Avenue was a mental hospital or that the juror was a mental patient there. This speculation, which is unsupported by the record before this Court, can afford no basis for relief here. Petitioners' remedy, if any, must be before the district court.

evidence of mental illness in general,[10] while the analysis of a sixth was influenced by it.[11] Ironically, had the sentence been accurately reproduced it would have provided strong evidence of mental incompetence. In the context of the letter, it is a statement by the juror that she could not ignore the evidence at trial despite her sympathy for Dioguardi.

Moreover, as the court of appeals observed, the psychiatric studies of the letter were "essentially horseback uninformed opinions" (Pet. App. 17a). The psychiatrists evaluated the juror's mental state at trial on the basis of

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[10] Dr. Stanley Portnow stated in an affidavit:

> Perhaps the most significant statement in the letter concerning the juror's state of mind during the course of the trial is as follows: "As I stated I cannot admit what appear before me, when I was on the jury bench." We have here an admission that the juror visually hallucinated during the course of trial [App. 1065-66].

Dr. Robert W. Damino also attached great importance to this statement:

> The content of the letter of Gemena Rush indicates very definitely that this woman was in a delusional state while serving on the jury: "As I stated I cannot admit what appear before me, when I was on the jury bench." This single statement alone, even in the absence of a large amount of other psychodynamic evidence, indicates that Gemena Rush could not properly evaluate evidence or make any kind of logical connections in regard to the evidence when she was serving on the jury [App. 1072].

Dr. Damino further asserted that the statement was evidence that "her decision for conviction may very well have been a decision of convicting herself because of guilt regarding her own activities, rather than any activities of the accused." [App. 1072.]

[11] Dr. Jerry C. Atkins did not discuss any of the letter's statements, but referred to the "visions" the juror had during trial (App. 1073). The erroneous statement in the letter is the only possible basis for a conclusion that the juror hallucinated at that time.

the letter alone.[12] Although free to provide their psychiatrists with information regarding the trial, its issues, and the juror's background, appearance, and in-court behavior, petitioners apparently failed to do so. Without such information, the letter's tone, language, references, or structure cannot be fairly and properly evaluated.

Further, several of the analyses show evidence of having been hastily conceived. Only one of the analyses, that of Dr. Portnow, was in affidavit form; the others were simply letters. Doctors Zucker, Atkins, and Karlan set forth their conclusions without discussing the evidence in detail or indicating the theories on which their findings were based. Few of the psychiatrists showed any knowledge of the purpose their studies were to serve.

The letter, moreover, is itself evidence of mental competence. It clearly indicates that days after the trial the juror could still recall key witnesses and points of evidence. Touched by his ordeal, the juror wrote to petitioner Dioguardi to offer him encouragement and to suggest that through repentance he would find salvation. Her expressed belief in clairvoyance, curses and astrology was not evidence of mental derangement, but indicative of a deeply religious and superstitious person with little formal education. The letter thus provides no evidence that the juror could not understand the proceedings and participate in the deliberations.

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[12] Apparently only Dr. Stanley Portnow was provided with additional information. His affidavit states that he had the opportunity to read the government's memorandum opposing the motion for a new trial (App. 1062).

The juror's behavior at trial, in fact, left a strong impression of mental competence. As the trial judge observed (Pet. App. 50a-51a):

> [T]here was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict [footnote omitted]. In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors.

In sum, petitioners' right to a jury of persons of sufficient mental competence "to render satisfactory jury service" under 28 U.S.C. 1865(b)(4) was not shown to have been violated, and they failed to adduce sufficient evidence to justify a mental competency inquiry.

2. Petitioners next contend that the prosecution's comment on their failure to call witnesses to rebut the factual content of the government's case violated their Fifth Amendment right to remain silent, since, they claim, they alone could have given contradicting testimony. This contention was fully discussed and correctly rejected by the court of appeals (Pet. App. 22a-24a).

In contrast to the cases relied on by petitioner (see *United States* v. *Flannery*, 451 F. 2d 880, 881-882 (C.A. 1); *United States* v. *Handman*, 447 F. 2d 853, 855 (C.A. 7)), the comment in question was, as the court of appeals declared, "neutralized" by "a prompt, corrective instruction" given by the trial court (Pet. App. 23a). The court also noted that unlike *Handman*, where the defendant was implicated solely by an informer's testimony about a telephone conversation between himself and the defendant, "this was not the close situation in which it was a question of the defendant's word against the word of one other" (*ibid.*). Finally, the court concluded that, given the scope of the operation, the large number of people involved, and the meetings "at which more were present than the defendants and the government's witnesses," witnesses could have been called to testify "or at least that in many other ways defendants could have waged factual war with the detailed evidence of the government's witnesses" (*ibid.*).

The prosecutor's statement, therefore, did not constitute an improper comment on the petitioners' failure to testify, and there is no conflict among the circuits on this issue.

3. Finally, petitioner Dioguardi contends that the trial court improperly imposed separate and consecutive penalties on him for the violations in counts 16 and 17, which he claims were part of a single transaction. This contention was fully discussed and correctly rejected by the court below (Pet. App. 26a-27a).

Count 16 involved the confirmation of the purchase in petitioner Ostrer's name of 2,000 shares of Belmont stock through Bruce & Co. on March 10, 1970; Count 17 involved confirmation of a similar purchase through Kelsey & Co. on the next day. Dioguardi argues that the

purchases and their confirmations should be treated as a single transaction in which Ostrer was attempting to purchase half of the outstanding shares of Belmont stock (Pet. 19-22). As the court of appeals observed, however, the debate over "whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud" has been resolved "in favor of the position that each transaction in a securities fraud case constitutes a separate offense" (Pet. App. 26a). See *United States* v. *Sanders*, 415 F. 2d 621 (C.A. 5), certiorari denied, 397 U.S. 976; see also *United States* v. *Binstock*, 37 F.R.D. 13 (S.D.N.Y.). In so ruling, it recognized that the unlawful acts described in counts 16 and 17 were fraudulent not only with respect to the scheme as a whole, but with respect to the investing public as well. Each of the purchases created the appearance of an active rising market in Belmont stock for the purpose of inducing members of the public to buy (App. 17).

As the court of appeals concluded, "[a]lthough a situation can be envisioned in which consecutive sentences on multiple fraud convictions would be questionable," the sequence of sentences imposed here on petitioner Dioguardi lay "within the [sound] discretion of the trial court" (Pet. App. 27a). See *United States* v. *Sanders*, *supra*, 415 F. 2d at 626.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Supreme Court of the United States.

OCTOBER TERM, 1974.

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LOUIS OSTRER,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Reply Memorandum.

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Petitioner's Reply Memorandum.

This memorandum is submitted in response to the brief for the United States in opposition, which was served on the petitioner's counsel on or about September 16, 1974.

The Government, in its opposition to the certiorari petition, argues that since the petitioner relies "almost exclusively" on the Rush letter and on "the analyses of that letter by seven different phychiatrists," and since those psychiatrists' analyses were based "on an erroneous version of the letter,"[1] the analyses are worthless and can-

[1] The erroneous version of the letter given to the psychiatrists stated ". . . I cannot *admit* what appear before me when I was on the jury bench." instead of correctly stating ". . . I cannot *omit* what appear before me when I was on the jury bench."

not lead to a conclusion that the juror was either insane or hallucinating during the trial. The Government contends that "the mistranscription was crucial, since the mistake constituted the only concrete evidence in the letter that the juror had hallucinated at trial." (Government's Brief at 7.)

The Government's point is trivial, and it was dismissed even by the Court of Appeals majority. Contrary to the Government's assertion that *all* of the psychiatrists relied on the mistranscription, the majority concluded that while six of the seven psychiatrists had received the erroneous version, and while "these errors may have influenced their reading and subsequent analysis of the letter," nevertheless "we do not think [the error influenced their analyses] significantly." (Petitioner's Appendix at 35, n. 8.) The majority specifically took issue with the Government's argument made before the Court of Appeals, and now repeated in its memorandum to this Court, that the mistranscription was "the cornerstone of [the] various psychiatric opinions." (Appendix at 35, n. 8.)

Furthermore, petitioner's counsel is now in possession of a supplemental affidavit of Dr. Stanley L. Portnow, indicating that the mistranscription had no effect on his conclusions and that the word change would not have affected his judgment. At a hearing, all of the psychiatrists called would so testify. This is in complete accord with the Court of Appeals majority's conclusion that "[t]he defendants' contentions concerning the competency of Miss Rush rest as much on the letter taken as a whole as on any particular sentences." (Appendix at 35, n. 8.) [2]

[2] Since there was no hearing below, and since the Government's assertions regarding the mistranscriptions are entirely *dehors* the record, it is appropriate for this Court either to consider *both* the Government's allegation *and* petitioner's supplemental affidavit, or *neither* of these.

Most remarkable is the Government's conclusion that once the mistranscription is corrected, the Rush letter provides "strong evidence of mental competence." (Government's Brief at 8.) How the Government can argue that such a letter provides "strong evidence of mental competence," and how the Government can interpret Miss Rush's statements to refer to evidence she viewed at trial rather than evidence emanating from her claimed "clairvoyant" powers, is a complete mystery, and such an interpretation receives absolutely no support from the text or the context. Neither of the lower courts reached the absurd conclusion that the Government seriously asks this Court to accept—that the letter, or parts of it, actually provide "strong evidence of mental competence."

The Government goes on (Government's Brief at 9) to claim that simply because Miss Rush's letter indicates that she had a good memory for detail, therefore she must have been competent. Such reasoning is absurd and would make a competent person out of, for example, an idiot savant, whose memory for detail, but whose inability to make sense out of logical facts, is well-known to psychiatrists. The main question is whether Miss Rush remembered some facts and events which simply did not take place at the trial.

The Government claims (Brief at 8) that the psychiatrists' opinions were "uninformed." The Government fails to note, however, that the psychiatrists had nothing before them except the letter because the District Court issued an order forbidding the interview of Miss Rush or of any of the other jurors. (In this regard, see Judge Feinberg's dissent, Appendix at 54.)

The Government denies petitioner's claim that the majority rested its decision on an assumption that the mental infirmity disqualification of 28 U.S.C. § 1865 "applied only

to mentally ill persons who have been formally adjudicated as 'insane' or 'incompetent'. . . ." (Government's Brief at 6-7, including n. 8.) Yet the Court of Appeals majority decision is entirely clear on this point, and indeed petitioner's reading of that opinion is the correct one. Stated the majority:

> "With respect to post-verdict evidence of possible juror incompetency during the trial, courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. [Footnote omitted.] Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency [footnote omitted], have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial." (Appendix at 42-43.)

The Government appears to recognize how unrealistic such a standard is, and this is doubtless the reason the Government backs away from sanctioning such a standard. But the Government cannot back away from the fact that the Court of Appeals majority expressly relied on that standard. Every case cited by the Court of Appeals on this point adopts precisely that same standard. If indeed the Government believes that another, more modern and enlightened standard is more appropriate, then the Government should be joining in the petitioner's request that a writ of certiorari issue.

The Government (Brief at 7, n. 9) claims that "there is no evidence to support [petitioner's] conclusion that the juror was a mental patient who worked part-time attending other patients at Flower Fifth Avenue Hospital,"

and that there is not even evidence indicating that Flower Fifth Avenue was a mental hospital or that the juror was a patient there. (See the Petition at 24-26.) However, before counsel for petitioner stated in the petition (at 26) that Flower Fifth Avenue Hospital "does have a psychiatric service and apparently does have a program of employing psychiatric patients as attendants," counsel checked this fact with the administration of that hospital and learned that the hospital does have a large psychiatric ward, and that patients are often used as "patient-attendants" to help care for other patients. Counsel could not determine whether Miss Rush was a patient there, because the District Court's order explicitly precluded all investigation of Juror Rush. The Government cannot now fault petitioner for his failure to conduct precisely the sort of investigation that the District Court precluded him from conducting.

Finally, the Government does not deny here what it acknowledged below—namely, that the hearing procedure requested by petitioner "would provide maximum safeguards for the jurors' individual rights of privacy."[3] In light of this acknowledgment, there is no possible justification for allowing this probably-tainted conviction to stand without further inquiry into the juror's competence by the District Court.

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[3] See Petition for Writ of Certiorari at 23-24 for an elaboration of this point and for quotations from the Government's memorandum below.

Conclusion.

For the foregoing reasons and for those stated in the petition, a writ of certiorari should issue.

Respectfully submitted,

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